IN THE SUPREME COURT OF INDIA

(CIVIL ORIGINAL JURISDICTION)

WRIT PETITION(CIVIL) NO. 494 of 2012, 797 of 2016 & 342 of 2016

K.S. Puttaswamy(Retd) & Anr. ... Petitioners

Versus

Union of India & Others. ... Respondents

VOLUME -II

COMPILATION

SHRI RAKESH DWIVEDI

SENIOR ADVOCATE

FOR STATE OF GUJARAT

I N D E X

[410 US 1]

UNITED STATES, Petitioner,

v

ANTONIO DIONISIO

410 US 1, 35 L Ed 2d 67, 93 S Ct 764

[No. 71-229]

Argued November 6, 1972. Decided January 22, 1973.

SUMMARY

A special federal grand jury, which was investigating possible violations of gambling statutes, and which had received in evidence voice recordings from authorized wiretaps, subpoenaed about 20 persons and directed them to make voice exemplars at the United States Attorney's office by reading the transcript of the wiretaps into a recording device, such exemplars to be then compared for identification purposes with the wiretap recordings. Upon refusal by one of the witnesses to give the exemplar, the government filed a petition in the United States District Court for the Northern District of Illinois, Eastern Division, to compel compliance, and the District Court, ordering compliance, rejected the witness' contentions that compelling the voice exemplar would violate his Fourth and Fifth Amendment rights. Upon the witness' continued refusal to comply, the District Court adjudged him in civil contempt. The Court of Appeals for the Seventh District reversed, holding that while compelling the voice exemplar would not violate the Fifth Amendment's privilege against self-incrimination, nevertheless the Fourth Amendment was applicable and required a preliminary showing of reasonableness before the witness could be compelled to furnish the exemplar (442 F2d 276).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by STEWART, J., it was held (1) expressing the view of seven members of the court, that compelling the grand jury witness to furnish the voice exemplar did not violate the Fifth Amendment privilege against self-incrimination, since the exemplar was to be used solely to measure the physical properties of the witness' voice, not for the testimonial or communicative content of what was to be said, and (2) expressing the view of six members of the court, that compelling the witness to furnish the voice exemplar did not violate the Fourth Amendment, and thus a preliminary showing of reasonableness was not required, since

Briefs of Counsel, p 723, infra.

a subpoena to appear before a grand jury was not a "seizure" in the Fourth Amendment sense, and since the grand jury's directive to furnish the exemplar compelled production of a physical characteristic which was constantly exposed to the public, and which thus was not protected by the Fourth Amendment.

BRENNAN, J., concurred in holding (1) above, but dissented from holding (2), expressing the view that while no unreasonable seizure was effected by a grand jury subpoena limited to requiring the appearance of a suspect to "testify," nevertheless reasonableness could not be presumed, but must be proved by the government, as to a seizure under a subpoena requiring a suspect's appearance in order to obtain his voice exemplar.

DOUGLAS, J., dissented, stating that (1) the Fourth Amendment prohibited a law enforcement official from compelling the production of evidence absent a showing of the reasonableness of the seizure, (2) although a person's speech was the vehicle of normal, social intercourse, nevertheless when such personal characteristic was sought for identification purposes, the government entered the zone of privacy protected by the Fourth Amendment and should be required to make a showing of reasonableness before seizure could be made, (3) the protection of the Fourth Amendment should be fully applied to proceedings of a grand jury, which was actually a tool of the prosecutor, and (4) while it was not necessary to reach the Fifth Amendment question, he adhered to his previously expressed view that the Fifth Amendment should not be restricted to testimonial compulsion.

MARSHALL, J., dissenting, expressed the views that (1) although it was not necessary to determine the Fifth Amendment claim in this case, he had serious reservations as to whether the Fifth Amendment privilege against self-incrimination should be limited to only testimonial evidence, since the government should not be allowed to compel a person to provide possibly incriminating physical evidence which could be acquired only with the person's affirmative co-operation, (2) the Fourth Amendment, which was intended to protect the individual from arbitrary and unreasonable intrusion into his private life and personal liberty, should be applied to grand jury subpoenas directed to obtaining physical evidence from the witness, such as exemplars, rather than "testimony," and (3) when the grand jury requested physical evidence from a witness, the government should first be required to establish the reasonableness of such request in an adversary proceeding, thus protecting the citizen from unreasonable and arbitrary governmental interference and insuring that the broad subpoena powers of the grand jury would not be turned into a tool of prosecutorial oppression.

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Appeal and Error § 21.9 — review on certiorari — conflict of decisions

1. The United States Supreme Court will grant a petition for certiorari in a case involving the question whether compelling a federal grand jury witness to furnish a voice exemplar for identification purposes violates the Fourth and Fifth Amendments, where there is a conflict between decisions of different Federal Courts of Appeals.

Witnesses § 74 — self-incrimination — grand jury witness — voice exemplars

2. Compelling a federal grand jury witness to furnish recorded voice exemplars, sought for identification purposes through comparison with other voice recordings in evidence before the grand jury, does not violate the Fifth Amendment privilege against self-incrimination, since the exemplars are to be used solely to measure the physicial properties of the witness' voice, not for the testimonial or communicative content of what was to be said.

Witnesses § 72 — self-incrimination — display of physical characteristics

3. The compelled display of identifiable physical characteristics infringes no interest protected by the

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

38 AM JUR 2d, Grand Jury §§ 37, 38; AM JUR, Searches and Seizures (1st ed §§ 52–54); AM JUR, Witnesses (1st ed §§ 40, 63)

12 AM JUR PL & PR FORMS (Rev ed), Grand Jury, Forms 1–3

US L ED DIGEST, Search and Seizure §§ 11, 15; Witnesses § 74

ALR DIGESTS, Search and Seizure §§ 15, 16; Witnesses § 76

L ED INDEX TO ANNO, Grand Jury; Search and Seizure; Witnesses

ALR QUICK INDEX, Grand Jury; Search and Seizure; Self-Incrimination

FEDERAL QUICK INDEX, Grand Jury; Search and Seizure; Self-Incrimination

ANNOTATION REFERENCES

Physical examination or exhibition of, or tests upon, suspect or accused, as violating rights guaranteed by Federal Constitution. 16 L Ed 2d 1332, 22 L Ed 2d 909; 164 ALR 967, 25 ALR2d 1407.

Propriety of requiring accused to give handwriting exemplar. 43 ALR 3d 653.

Requiring suspect or defendant in criminal case to demonstrate voice for purposes of identification. 24 ALR3d 1261.

Identification of accused by his voice. 70 ALR2d 995.

Privilege against self-incrimination as to testimony before grand jury. 38 ALR2d 225.

privilege against compulsory self-incrimination.

Search and Seizure § 15 — grand jury — requiring voice exemplars

4. Compelling a federal grand jury witness to furnish recorded voice exemplars, sought for identification purposes through comparison with other voice recordings in evidence before the grand jury, does not violate the Fourth Amendment, and thus a preliminary showing of reasonableness is not required, it being irrelevant that a large number of witnesses were summoned by the grand jury and were directed to furnish voice exemplars.

Search and Seizure §§ 5, 8 — Fourth Amendment

5. The Fourth Amendment protects people, not places, and wherever an individual may harbor a reasonable expectation of privacy, he is entitled to be free from unreasonable governmental intrusion.

Search and Seizure § 11 — Fourth Amendment — obtaining physical evidence from person

6. The obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two different levels—the "seizure" of the "person" necessary to bring him into contact with government agents, and the subsequent search for and seizure of the evidence.

Search and Seizure § 11 — grand jury subpoena — "seizure"

7. A subpoena to appear before a federal grand jury is not a "seizure" in the Fourth Amendment sense, even though the summons may be inconvenient or burdensome.

Grand Jury § 5 — subpoena power

8. Citizens generally are not constitutionally immune from grand jury subpoenas.

Grand Jury § 5 — witnesses

9. The personal sacrifice involved in the obligation of every person to appear and give evidence before a grand jury is a part of the necessary contribution of the individual to the welfare of the public; while such duty may be onerous at times, it is necessary to the administration of justice.

Grand Jury § 5 — witnesses

10. The obligation to appear as a witness before a grand jury is no different for a person who may himself be the subject of the grand jury inquiry.

Grand Jury § 5 — subpoenas — court control

11. A grand jury subpoena remains at all times under the control and supervision of a court.

Search and Seizure § 15 — grand jury — subpoena to testify

12. A grand jury subpoena to testify is not that kind of governmental intrusion on privacy against which the Fourth Amendment affords protection, once the Fifth Amendment is satisfied.

Search and Seizure § 11 — Fourth Amendment — scope of search and seizure of person

13. The Fourth Amendment applies to all searches and seizures of the person, no matter what the scope or duration.

Witnesses § 74 — self-incrimination — grand jury proceedings

14. A grand jury cannot require a witness to testify against himself; nor can it require the production by a person of private books and records that would incriminate him.

Search and Seizure § 21 — grand jury — subpoena duces tecum

15. The Fourth Amendment provides protection against a grand jury subpoena duces tecum too sweeping in its terms to be regarded as reasonable.

Grand Jury § 5 — subpoena power

16. No person has a justifiable expectation of immunity from a grand jury subpoena.

Grand Jury § 1 — investigative powers

17. Because its task is to inquire

into the existence of possible criminal conduct and to return only well-founded indictments, a grand jury's investigative powers are necessarily broad.

Grand Jury § 1 — scope of inquiry

18. The scope of a grand jury's inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.

Grand Jury § 5 — summoning witnesses

19. A witness may not resist a grand jury subpoena merely on the ground that too many witnesses have been called.

Search and Seizure § 15 — grand jury — directive to furnish voice exemplar

20. A federal grand jury's directive to a witness to furnish recorded voice exemplars, sought for identification purposes through comparison with other voice recordings in evidence before the grand jury, does not infringe upon the witnesses' rights under the Fourth Amendment—the directive compelling production only of a physical characteristic which is constantly exposed to the public.

Search and Seizure § 8 — protected area — exposure to public

21. The Fourth Amendment provides no protection for what a person knowingly exposes to the public, even in his home or office.

Search and Seizure §§ 8, 15 — protected area — voice and handwriting exemplars — grand jury

22. While the content of a communication is entitled to Fourth Amendment protection, a person's voice and handwriting—which are the underlying identifying characteristics and the constant factors throughout both public and private communications—are open for all to see or hear; hence, for Fourth Amendment purposes, no intrusion into an individual's privacy results from execution of handwriting or voice exemplars compelled by a grand jury, nothing being exposed to the grand jury that has not previously been exposed to the public at large.

Grand Jury §§ 1, 4 — investigative powers — proceedings

23. A grand jury has broad investigative powers to determine whether a crime has been committed and who has committed it; the jurors may act on tips, rumors, evidence offered by the prosecution, or their own personal knowledge, and no grand jury witness is entitled to set limits to the investigation that the grand jury may conduct.

Grand Jury § 6 — examination of witnesses

24. The examination of witnesses before a grand jury need not be preceded by an indictment formally preferred, since the very object of the examination is to ascertain who shall be indicted.

Grand Jury § 1 — Fifth Amendment — nature of jury

25. The Fifth Amendment guarantee that no civilian may be brought to trial for an infamous crime unless on a presentment or indictment of a grand jury presupposes an investigative body acting independently of either prosecuting attorney or judge, whose mission is to clear the innocent, no less than to bring to trial those who may be guilty.

Grand Jury § 1 — purpose

26. The grand jury is designed as a means not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity.

Grand Jury §§ 1, 6 — investigations — external supervision

27. Although the grand jury may not always serve its historic role as a

protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor, nevertheless if it is to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.

SYLLABUS BY REPORTER OF DECISIONS

A grand jury subpoenaed about 20 persons, including respondent, to give voice exemplars for identification purposes. Respondent, on Fourth and Fifth Amendment grounds, refused to comply. The District Court rejected both claims and adjudged respondent in contempt. The Court of Appeals agreed in rejecting respondent's Fifth Amendment claim but reversed on the ground that the Fourth Amendment required a preliminary showing of reasonableness before a grand jury witness could be compelled to furnish a voice exemplar and that here the proposed "seizures" would be unreasonable because of the large number of witnesses subpoenaed to produce the exemplars. *Held:*

1. The compelled production of the voice exemplars would not violate the Fifth Amendment privilege against compulsory self-incrimination, since they were to be used only for identification purposes, and not for the testimonial or communicative content of the utterances.

2. Respondent's Fourth Amendment claim is also invalid.

(a) A subpoena to compel a person to appear before a grand jury does not constitute a "seizure" within the meaning of the Fourth Amendment, and the fact that many others besides respondent were ordered to give voice recordings did not render the subpoena unconstitutional. Davis v Mississippi, 394 US 721, 22 L Ed 2d 676, 89 S Ct 1394, distinguished.

(b) The grand jury's directive to make the voice recording infringed no valid Fourth Amendment interest.

(c) Since neither the summons to appear before the grand jury nor its directive to give a voice exemplar contravened the Fourth Amendment, the Court of Appeals erred in requiring a preliminary showing of reasonableness before respondent could be compelled to furnish the exemplar.

442 F2d 276, reversed and remanded.

Stewart, J., delivered the opinion of the Court, in which Burger, C. J., and White, Blackmun, Powell, and Rehnquist, JJ., joined. Brennan, J., filed an opinion concurring in part and dissenting in part, post, p 22, 35 L Ed 2d p 82, Douglas, J., post, p 23, 35 L Ed 2d p 82, and Marshall, J., post, p 31, 35 L Ed 2d p 87, filed dissenting opinions.

APPEARANCES OF COUNSEL

Philip A. Lacovara argued the cause for petitioner.

John Powers Crowley argued the cause for respondent.

Briefs of Counsel, p 723, infra.

OPINION OF THE COURT

[410 US 2]

Mr. Justice **Stewart** delivered the opinion of the Court.

A special grand jury was convened in the Northern District of Illinois in February 1971, to investigate possible violations of federal criminal statutes relating to gambling. In the course of its investigation, the grand jury received in evidence certain voice recordings that had been obtained pursuant to court orders.[1]

1. The court orders were issued pursuant to 18 USC § 2518 [18 USCS § 2518], a statute authorizing the interception of wire communications upon a judicial determination that "(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter [including the transmission of wagering informa-

[410 US 3]

The grand jury subpoenaed approximately 20 persons, including the respondent Dionisio, seeking to obtain from them voice exemplars for comparison with the recorded conversations that had been received in evidence. Each witness was advised that he was a potential defendant in a criminal prosecution. Each was asked to examine a transcript of an intercepted conversation, and to go to a nearby office of the United States Attorney to read the transcript into a recording device. The witnesses were advised that they would be allowed to have their attorneys present when they read the transcripts. Dionisio and other witnesses refused to furnish the voice exemplars, asserting that these disclosures would violate their rights under the Fourth and Fifth Amendments.

The Government then filed separate petitions in the United States District Court to compel Dionisio and the other witnesses to furnish the voice exemplars to the grand jury. The petitions stated that the exemplars were "essential and necessary" to the grand jury investigation, and that they would "be used solely as a standard of comparison in order to determine whether or not the witness is the person whose voice was intercepted . . . ."

Following a hearing, the District Judge rejected the witnesses' constitutional arguments and ordered them to comply with the grand jury's request. He reasoned that voice exemplars, like handwriting exemplars or fingerprints, were not testimonial or communicative evidence, and that consequently the order to produce them would

[410 US 4]

not compel any witness to testify against himself. The district judge also found that there would be no Fourth Amendment violation, because the grand jury subpoena did not itself violate the Fourth Amendment, and the order to produce the voice exemplars would involve no unreasonable search and seizure within the proscription of that Amendment:

> "The witnesses are lawfully before the grand jury pursuant to subpoena. The Fourth Amendment prohibition against unreasonable search and seizure applies only where identifying physical characteristics, such as fingerprints, are obtained as a result of unlawful detention of a suspect, or when an intrusion into the body, such as a blood test, is undertaken without a warrant, absent an emergency situation. E. g., Davis v Mississippi, 394 US 721, 724–728 [22 L Ed 2d 676, 89 S Ct 1394] (1969); Schmerber v California, 384 US 757, 770–771 [16 L Ed 2d 908, 86 S Ct 1826] (1966)."[2]

When Dionisio persisted in his refusal to respond to the grand jury's directive, the District Court adjudged him in civil contempt and ordered him committed to custody until he obeyed the court order, or until the expiration of 18 months.[3]

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tion]; (b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception; (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; (d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person."

2. The decision of the District Court is unreported.

3. The life of the special grand jury was

The Court of Appeals for the Seventh Circuit reversed. 442 F 2d 276. It agreed with the District Court in rejecting the Fifth Amendment claims,[4] but concluded that to compel the voice recordings would violate the Fourth Amendment. In the court's view, the grand

[410 US 5]

jury was "seeking to obtain the voice exemplars of the witnesses by the use of its subpoena powers because probable cause did not exist for their arrest or for some other, less unusual, method of compelling the production of the exemplars." Id., at 280. The court found that the Fourth Amendment applied to grand jury process, and that "under the fourth amendment law enforcement officials may not compel the production of physical evidence absent a showing of the reasonableness of the seizure. Davis v Mississippi, 394 US 721 . . . [22 L Ed 2d 676, 89 S Ct 1394]." Ibid.

In Davis this Court held that it was error to admit the petitioner's fingerprints into evidence at his trial for rape, because they had been obtained during a police detention following a lawless wholesale roundup of the petitioner and more than 20 other youths. Equating the procedures followed by the grand jury in the present case to the fingerprint detentions in Davis, the Court of Appeals reasoned that "[t]he dragnet effect here, where approximately twenty persons were subpoenaed for purposes of identification, has the same invidious effect on fourth amendment rights as the practice condemned in Davis." Id., at 281.

[1] In view of a clear conflict between this decision and one in the Court of Appeals for the Second Circuit,[5] we granted the Government's petition for certiorari. 406 US 956, 32 L Ed 2d 343, 92 S Ct 2056.

I

[2, 3] The Court of Appeals correctly rejected the contention that the compelled production of the voice exemplars would violate the Fifth Amendment. It has long been held that the compelled display of identifiable physical characteristics infringes no interest protected by

[410 US 6]

the privilege against compulsory self-incrimination. In Holt v United States, 218 US 245, 252, 54 L Ed 1021, 31 S Ct 2, Mr. Justice Holmes, writing for the Court, dismissed as an "extravagant extension of the Fifth Amendment" the argument that it violated the privilege to require a defendant to put on a blouse for identification purposes. He explained that "the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." Id, at 252–253, 54 L Ed 1021.

More recently, in Schmerber v California, 384 US 757, 16 L Ed 2d 908, 86 S Ct 1826 we relied on Holt, and noted that:

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18 months, but could be extended up to an additional 18 months. 18 USC § 3331 [18 USCS § 3331].

4. The court also rejected the argument that the grand jury procedure violated the witnesses' Sixth Amendment right to counsel. It found the contention particularly without merit in view of the option afforded the witnesses to have their attorneys present while they made the voice recordings. 442 F2d 276, 278.

5. United States v Doe (Schwartz), 457 F2d 895 (affirming civil contempt judgment against grand jury witness for refusal to furnish handwriting exemplars).

"Both federal and state courts have usually held that [the privilege] offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." Id., at 764, 16 L Ed 2d 908 (footnote omitted).

The Court held that the extraction and chemical analysis of a blood sample involved no "shadow of testimonial compulsion upon or enforced communication by the accused." Id., at 765, 16 L Ed 2d 908.

These cases led us to conclude in Gilbert v California, 388 US 263, 18 L Ed 2d 1178, 87 S Ct 1951 that handwriting exemplars were not protected by the privilege against compulsory self-incrimination. While "[o]ne's voice and handwriting are, of course, means of communication," we held that a "mere handwriting exemplar, in contrast to the content of what

[410 US 7]

is written, like the voice or body itself, is an identifying physical characteristic outside its protection." Id., at 266–267, 18 L Ed 2d 1178. And similarly in United States v Wade, 388 US 218, 18 L Ed 2d 1149, 87 S Ct 1926 we found no error in compelling a defendant accused of bank robbery to utter in a lineup words that had allegedly been spoken by the robber. The accused there was "required to use his voice as an identifying physical characteristic, not to speak his guilt." Id., at 222–223, 18 L Ed 2d 1149.

Wade and Gilbert definitively refute any contention that the compelled production of the voice exemplars in this case would violate the Fifth Amendment. The voice recordings were to be used solely to measure the physical properties of the witnesses' voices, not for the testimonial or communicative content of what was to be said.[6]

II

[410 US 8]

[4] The Court of Appeals held

6. The Court of Appeals for the Seventh Circuit appears to have recanted somewhat from its clear and correct holding in the present case that the compelled production of voice exemplars would not violate the privilege against compulsory self-incrimination. In subsequently explaining that holding, the Court qualified it:

"Nevertheless, the witnesses were potential defendants, and since the purpose of the voice exemplars was to identify the voices obtained by FBI agents pursuant to a court-ordered wiretap, the self-incriminatory impact of the compelled exemplars was clear. Thus the compelled exemplars were at odds with the spirit of the Fifth Amendment. Because the Fifth Amendment illuminates the Fourth (see . . . Boyd v United States [116 US 616 [29 L Ed 746, 6 S Ct 524]] . . .), the Fourth Amendment violation appears more readily than where immunity is granted, and in Dionisio immunity had not yet been granted." Fraser v United States, 452 F2d 616, 619, n 5.

But Boyd dealt with the compulsory production of private books and records, testimonial sources, a circumstance in which the "Fourth and Fifth Amendments run almost into each other." 116 US, at 630, 29 L Ed 746. In the present case, by contrast, no Fifth Amendment interests are jeopardized; there is no hint of testimonial compulsion. The Court of Appeals' subsequent attempt to read the "spirit of the Fifth Amendment" into the production of voice exemplars cannot survive comparison with Wade, Gilbert, and Schmerber.

that the Fourth Amendment required a preliminary showing of reasonableness before a grand jury witness could be compelled to furnish a voice exemplar, and that in this case the proposed "seizures" of the voice exemplars would be unreasonable because of the large number of witnesses summoned by the grand jury and directed to produce such exemplars. We disagree.

[5] The Fourth Amendment guarantees that all people shall be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." Any Fourth Amendment violation in the present setting must rest on a lawless governmental intrusion upon the privacy of "persons" rather than on interference with "property relationships or private papers." Schmerber v California, 384 US, at 767, 16 L Ed 2d 908; see United States v Doe (*Schwartz*), 457 F2d 895, 897. In Terry v Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868, the Court explained the protection afforded to "persons" in terms of the statement in Katz v United States, 389 US 347, 19 L Ed 2d 576, 88 S Ct 507, that "the Fourth Amendment protects people, not places," id., at 351, 19 L Ed 2d 576 and concluded that "wherever an individual may harbor a reasonable 'expectation of privacy,' . . . he is entitled to be free from unreasonable governmental intrusion." Terry v Ohio, supra, at 9, 20 L Ed 2d 889.

[6] As the Court made clear in Schmerber, supra, the obtaining of physical evidence from a person involves a potential Fourth Amendment violation at two different levels —the "seizure" of the "person" necessary to bring him into contact with government agents, see Davis v Mississippi, 394 US 721, 22 L Ed 2d 676, 89 S Ct 1394, and the subsequent search for and seizure of the evidence. In Schmerber, we found the initial seizure of the accused justified as a lawful arrest, and the subsequent seizure of the blood sample from his body reasonable in light ot the exigent circumstances.

[410 US 9]

And in Terry, we concluded that neither the initial seizure of the person, an investigatory "stop" by a policeman, nor the subsequent search, a pat-down of his outer clothing for weapons, constituted a violation of the Fourth and Fourteenth Amendments. The constitutionality of the compulsory production of exemplars from a grand jury witness necessarily turns on the same dual inquiry—whether either the initial compulsion of the person to appear before the grand jury, or the subsequent directive to make a voice recording is an unreasonable "seizure" within the meaning of the Fourth Amendment.

[7, 8] It is clear that a subpoena to appear before a grand jury is not a "seizure" in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome. Last Term we again acknowledged what has long been recognized,[7] that "[c]itizens generally are not constitutionally immune from grand jury subpoenas . . . ." Branzburg v Hayes, 408 US 665, 682, 33 L Ed 2d 626, 92 S Ct 2646. We concluded that:

> "[A]lthough the powers of the grand jury are not unlimited and are subject to the supervision of

7. See generally Kastigar v United States, 406 US 441, 443–444, 32 L Ed 2d 212, 92 S Ct 1653; Blair v United States, 250 US 273, 279–281, 63 L Ed 979, 39 S Ct 468; 8 J. Wigmore, Evidence § 2191 (J. McNaughton rev 1961).

a judge, the longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege, United States v Bryan, 339 US, at 331, 94 L Ed 884; Blackmer v United States, 284 US 421, 438, 76 L Ed 375, 52 S Ct 252 (1932); 8 J. Wigmore, Evidence § 2192 (McNaughton rev 1961), is particularly applicable to grand jury proceedings." Id., at 688, 33 L Ed 2d 626.

[9, 10] These are recent reaffirmations of the historically grounded obligation of every person to appear and give

[410 US 10]

his evidence before the grand jury. "The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." Blair v United States, 250 US 273, 281, 63 L Ed 979, 39 S Ct 468. See also Garland v Torre, 259 F2d 545, 549. And while the duty may be "onerous" at times, it is "necessary to the administration of justice." Blair v United States, supra, at 281, 63 L Ed 979.[8]

[11, 12] The compulsion exerted by a grand jury subpoena differs from the seizure effected by an arrest or even an investigative "stop" in more than civic obligation. For, as Judge Friendly wrote for the Court of Appeals for the Second Circuit:

"The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court." United States v Doe (Schwartz) 457 F2d, at 898.

Thus, the Court of Appeals for the Seventh Circuit correctly recognized in a case subsequent to the one now before us, that a "grand jury subpoena to testify is not that kind of governmental intrusion on privacy against which the Fourth Amendment affords protection, once the Fifth Amendment is satisfied." Fraser v United States, 452 F2d 616, 620; cf. United States v Weinberg, 439 F2d 743, 748–749.

[410 US 11]

[13] This case is thus quite different from Davis v Mississippi, supra, on which the Court of Appeals primarily relied. For in Davis it was the initial seizure—the lawless dragnet detention—that violated the Fourth and Fourteenth Amendments, not the taking of the fingerprints. We noted that "[i]nvestigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention," 394 US, at 726, 22 L Ed 2d 676, and we left open the question whether, consistently with the Fourth and Fourteenth Amendments, narrowly circumscribed procedures might be developed for obtaining fingerprints from people when there was no probable cause to arrest them. Id., at 728, 22 L Ed 2d 676.[9] Davis is

[10] 8. The obligation to appear is no different for a person who may himself be the subject of the grand jury inquiry. See United States v Doe (Schwartz), 457 F2d, at 898; United States v Winter, 348 F2d 204, 207–208.

[13] 9. Judge Weinfeld correctly characterized Davis as "but another applica-

plainly inapposite to a case where the initial restraint does not itself infringe the Fourth Amendment.

[14, 15] This is not to say that a grand jury subpoena is some talisman that dissolves all constitutional protections. The grand jury cannot require a witness to testify against himself. It cannot require the production by a person of private books and records that would incriminate him. See Boyd v United States, 116 US 616, 633–635, 29 L Ed 746, 6 S Ct 524.[10] The Fourth Amendment provides protection against a grand jury subpoena duces tecum too sweeping in its terms "to be regarded as reasonable." Hale v

[410 US 12]

Henkel, 201 US 43, 76, 50 L Ed 652, 26 S Ct 370; cf. Oklahoma Press Publishing Co. v Walling, 327 US 186, 208, 217, 90 L Ed 614, 66 S Ct 494, 166 ALR 531. And last Term, in the context of a First Amendment claim, we indicated that the Constitution could not tolerate the transformation of the grand jury into an instrument of oppression: "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth." Branzburg v Hayes, 408 US, at 707–708, 33 L Ed 2d 626. See also, id., at 710, 33 L Ed 2d 626 (Powell, J., concurring).

But we are here faced with no such constitutional infirmities in the subpoena to appear before the grand jury or in the order to make the voice recordings. There is, as we have said, no valid Fifth Amendment claim. There was no order to produce private books and papers, and no sweeping subpoena duces tecum. And even if Branzburg be extended beyond its First Amendment moorings and tied to a more generalized due process concept, there is still no indication in this case of the kind of harassment that was of concern there.

[4, 16–19] The Court of Appeals found critical significance in the fact that the grand jury had summoned approximately 20 witnesses to furnish voice exemplars.[11] We think that fact is basically irrelevant to the constitutional issues here. The grand jury may have been attempting to

[410 US 13]

identify a number of voices on the tapes in evidence, or it might have summoned the 20 witnesses in an effort to identify one voice. But whatever the case, "[a] grand jury's investigation is not fully carried out until every available clue has been

tion of the principle that the Fourth Amendment applies to all searches and seizures of the person no matter what the scope or duration. It held that in the circumstances there presented the detention for the sole purpose of fingerprinting was in violation of the Fourth Amendment ban against unreasonable search and seizure." Thom v New York Stock Exchange, 306 F Supp 1002, 1007 (footnote omitted). See also Allen v Cupp, 426 F2d 756, 760.

10. While Boyd was concerned with a motion to produce invoices at a forfeiture trial, the Court treated it as the equivalent of a subpoena duces tecum, and Hale v Henkel, 201 US 43, 76, 50 L Ed 652, 26 S Ct 370, applied Boyd in the context of a grand jury subpoena.

[16] 11. As noted above, supra, at 11, 35 L Ed 2d at 77, there is no valid comparison between the detentions of the 24 youths in Davis, and the grand jury subpoenas of the witnesses here. While the dragnet detentions by the police did constitute substantial intrusions into the Fourth and Fourteenth Amendment rights of each of the youths in Davis, no person has a justifiable expectation of immunity from a grand jury subpoena.

run down and all witnesses examined in every proper way to find if a crime has been committed . . . ." United States v Stone, 429 F2d 138, 140. See also Wood v Georgia, 370 US 375, 392, 8 L Ed 2d 569, 82 S Ct 1364. As the Court recalled last Term, "Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad." Branzburg v Hayes, supra, at 688, 33 L Ed 2d 626.[12] The grand jury may well find it desirable to call numerous witnesses in the course of an investigation. It does not follow that each witness may resist a subpoena on the ground that too many witnesses have been called. Neither the order to Dionisio to appear, nor the order to make a voice recording, was rendered unreasonable by the fact that many others were subjected to the same compulsion.

[20] But the conclusion that Dionisio's compulsory appearance before the grand jury was not an unreasonable "seizure" is the answer to only the first part of the Fourth Amendment inquiry here. Dionisio argues that the grand jury's subsequent directive to make the voice recording was itself an infringement of his rights

[410 US 14]

under the Fourth Amendment. We cannot accept that argument.

[21, 22] In Katz v United States, supra, we said that the Fourth Amendment provides no protection for what "a person knowingly exposes to the public, even in his own home or office . . . ." 389 US, at 351, 19 L Ed 2d 576. The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world. As the Court of Appeals for the Second Circuit stated:

> "Except for the rare recluse who chooses to live his life in complete solitude, in our daily lives we constantly speak and write, and while the content of a communication is entitled to Fourth Amendment protection . . . the underlying identifying characteristics—the constant factor throughout both public and private communications—are open for all to see or hear. There is no basis for constructing a wall of privacy against the grand jury which does not exist in casual contacts with strangers. Hence, no intrusion into an individual's privacy results from compelled execution of handwriting or voice exemplars; nothing is being exposed to the grand jury that has not previously been exposed to the public at large." United

[18] 12. "[The grand jury] is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning. Hendricks v United States, 223 US 178, 184 [56 L Ed 394, 32 S Ct 313]." Blair v United States, 250 US, at 282, 63 L Ed 979.

States v Doe (Schwartz), 457 F2d, at 898–899.

The required disclosure of a person's voice is thus immeasurably further removed from the Fourth Amendment protection than was the intrusion into the body effected by the blood extraction in Schmerber. "The

[410 US 15]

interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." Schmerber v California, 384 US, at 769–770, 16 L Ed 2d 908. Similarly, a seizure of voice exemplars does not involve the "severe, though brief, intrusion upon cherished personal security," effected by the "pat-down" in Terry—"surely . . . an annoying, frighening, and perhaps humiliating experience." Terry v Ohio, 392 US, at 24–25, 20 L Ed 2d 889. Rather, this is like the fingerprinting in Davis, where, though the initial dragnet detentions were constitutionally impermissible, we noted that the fingerprinting itself "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." Davis v Mississippi, 394 US, at 727, 22 L Ed 2d 676; cf. Thom v New York Stock Exchange, 306 F Supp 1002, 1009.

[4, 23, 24] Since neither the summons to appear before the grand jury nor its directive to make a voice recording infringed upon any interest protected by the Fourth Amendment, there was no justification for requiring the grand jury to satisfy even the minimal requirement of "reasonableness" imposed by the Court of Appeals.[13] See United States v Doe (Schwartz), supra, at 899–900. A grand jury has broad investigative powers to determine whether a crime has been committed and who has committed it. The jurors may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge. Branzburg v Hayes, 408 US, at 701, 33 L Ed 2d 626. No grand jury witness is "entitled to set limits to the investigation that the grand jury may conduct." Blair v United States, 250 US, at 282, 63 L Ed 979. And a sufficient basis

[410 US 16]

for an indictment may only emerge at the end of the investigation when all the evidence has been received.

> "It is impossible to conceive that . . . the examination of witnesses must be stopped until a basis is laid by an indictment formally preferred, when the very object of the examination is to ascertain who shall be indicted." Hale v Henkel, 201 US, at 65, 50 L Ed 652.

Since Dionisio raised no valid Fourth Amendment claim, there is no more reason to require a preliminary showing of reasonableness here than there would be in the case of any witness who, despite the lack of any constitutional or statutory privilege, declined to answer a question or comply with a grand jury request. Neither the Constitution nor our prior cases justify any such interference with grand jury proceedings.[14]

13. In Hale v Henkel, 201 US, at 77, 50 L Ed 652, the Court found that such a standard had not been met, but as noted above, supra, at 11–12, 35 L Ed 2d p 78, that was a case where the Fourth Amendment had been infringed by an overly broad subpoena to produce books and papers.

14. Mr. Justice Marshall, in dissent, post, p 31, 35 L Ed 2d p 87, suggests that a preliminary showing of "reasonableness" is required where the

[25-27] The Fifth Amendment guarantees that no civilian may be brought to trial for an infamous crime "unless on a presentment or indictment of a Grand Jury." This constitutional guarantee presupposes an investigative body "acting independently of either prosecuting attorney or judge," Stirone v United States, 361 US 212, 218, 4 L Ed 2d 252, 80 S Ct 270, whose mission is to clear the innocent, no less than

[410 US 17]

to bring to trial those who may be guilty.[15] Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws. Cf. United States v Ryan, 402 US 530, 532–533, 29 L Ed 2d 85, 91 S Ct 1580; Costello v United States, 350 US 359, 363–364, 100 L Ed 397, 76 S Ct 406; Cobbledick v United States, 309 US 323, 327–328, 84 L Ed 783, 60 S Ct 540.[16] The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor, but if it is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision

[410 US 18]

so long as it does not trench upon the legitimate rights of any witness called before it.

Since the Court of Appeals found an unreasonable search and seizure where none existed, and imposed a preliminary showing of reasonableness where none was required, its judgment is reversed and this case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

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grand jury subpoenas a witness to appear and produce handwriting or voice exemplars, but not when it subpoenas him to appear and testify. Such a distinction finds no support in the Constitution. His dissent argues that there is a potential Fourth Amendment violation in the case of a subpoenaed grand jury witness because of the asserted intrusiveness of the initial subpoena to appear—the possible stigma from a grand jury appearance and the inconvenience of the official restraint. But the initial directive to appear is as intrusive if the witness is called simply to testify as it is if he is summoned to produce physical evidence.

[26] 15. "[T]he institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial." Ex parte Bain, 121 US 1, 11, 30 L Ed 849, 7 S Ct 781 (quoting grand jury charge of Mr. Justice Field). See also Wood v Georgia, 370 US 375, 390, 8 L Ed 2d 569, 82 S Ct 1364.

16. The possibilities for delay caused by requiring initial showings of "reasonableness" are illustrated by the Court of Appeals' subsequent decision in In re September 1971 Grand Jury, 454 F2d 580, rev'd sub nom. United States v Mara, 410 US, p 19, 35 L Ed 2d 99, 93 S Ct 774, where the Court held that the Government was required to show in an adversary hearing that its request for exemplars was reasonable, and "reasonableness" included proof that the exemplars could not be obtained from other sources.

SEPARATE OPINIONS

[410 US 22]

Mr. Justice **Brennan**, concurring in part and dissenting in part in No. 71–229, and dissenting in No. 71–850.*

I agree, for the reasons stated by the Court, that respondents Dionisio's Fifth Amendment claims are without merit. I dissent, however, from the Court's rejection of Fourth Amendment claims of Dionisio and Mara as also without merit. I agree that no unreasonable seizure in violation

[410 US 23]

of the Fourth Amendment is effected by a grand jury subpoena limited to requiring the appearance of a suspect to *testify*. But insofar as the subpoena requires a suspect's appearance in order to obtain voice or handwriting exemplars from him, I conclude, substantially in agreement with Part II of my Brother Marshall's dissent, that the reasonableness under the Fourth Amendment of such a seizure cannot simply be presumed. I would therefore affirm the judgments of the Court of Appeals reversing the contempt convictions and remand with directions to the District Court to afford the Government the opportunity to prove reasonableness under the standard fashioned by the Court of Appeals.

Mr. Justice **Douglas**, dissenting.*

Judge William Campbell, who has been on the District Court in Chicago for over 32 years, recently made the following indictment against the grand jury:[1]

"This great institution of the past has long ceased to be the guardian of the people for which purpose it was created at Runnymede. Today it is but a convenient tool for the prosecutor—too often used solely for publicity. Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury."

It is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive.

[410 US 24]

The concession by the Court that the grand jury is no longer in a realistic sense "a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor" is reason enough to affirm these judgments.

It is not uncommon for witnesses summoned to appear before the grand jury at a designated room to discover that the room is the room of the prosecutor. The cases before us today are prime examples of this perversion.

Respondent Dionisio and approximately 19 others were subpoenaed by the Special February 1971 Grand Jury for the Northern District of Illinois in an investigation of illegal gambling operations. During the investigation, the grand jury had received as exhibits voice recordings obtained under court orders, on warrants issued under 18 USC § 2518 [18 USCS § 2518], authorizing wiretaps. The witnesses were instructed to go to the United States Attorney's office, with their own counsel if they desired, in the company of an FBI agent who had been appointed

* Editor's Note: This opinion also applies to United States v Mara (No. 71–850), p 99, infra.

1. 55 FRD 229, 253 (1972).

as an agent of the grand jury by its foreman, and to read the transcript of the wire interception. The readings were recorded. The grand jury then compared the voices taken from the wiretap and the witnesses' record. Dionisio refused to make the voice exemplars on the ground they would violate his rights under the Fourth and Fifth Amendments. The Government filed in the United States District Court for the Northern District of Illinois to compel the witness to furnish the exemplars to the grand jury. The court rejected the constitutional arguments of the respondent and demanded compliance. Dionisio again refused and was adjudged in civil contempt and placed in prison until he obeyed the court order or until the term of the special grand jury expired. The Court of Appeals reversed, concluding that to compel compliance would violate his Fourth Amendment rights. It held that voice exemplars are protected by the Constitution from unreasonable

[410 US 25]

seizures and that the Government failed to show the reasonableness of its actions.

The Special September 1971 Grand Jury, also in the Northern District of Illinois, was convened to investigate thefts of interstate shipments of goods that occurred in the State. Respondent Mara was subpoenaed and was requested to submit a sample of his handwriting before the grand jury. Mara refused. The Government went to the District Court for the Northern District of Illinois, asserting to the court that the handwriting exemplars were "essential and necessary" to the investigation. In an in camera proceeding, the Court held that the witness must comply with the request of the grand jury. The Court of Appeals reversed on the basis of its decision in In re Dionisio. It outlined the procedures the Government must follow in cases of this kind. First, the hearing to determine the constitutionality of the seizure must be held in open court in an adversary manner. Substantially, the Government must show that the grand jury was properly authorized to investigate a matter that Congress had power to regulate, that the information sought was relevant to the inquiry, and that the grand jury's request for exemplars was adequate, but not excessive, for the purposes of the relevant inquiry.

Today, the majority overrules this reasoned opinion of the Seventh Circuit.

Under the Fourth Amendment, law enforcement officers may not compel the production of evidence, absent a showing of the reasonableness of the seizure. Davis v Mississippi, 394 US 721, 22 L Ed 2d 676, 89 S Ct 1394; Boyd v United States, 116 US 616, 29 L Ed 746, 6 S Ct 524. The test protects the person's expectation of privacy over the thing. We said in Katz v United States, "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth

[410 US 26]

Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 US 347, 351–352, 19 L Ed 2d 576, 88 S Ct 507. The Government asserts that handwriting and voice exemplars do not invade the privacy of an individual when taken because they are physical characteristics that are exposed to the public. It argues that, unless the person involved is a recluse, these characteristics are not meant to be private to the individual and thus

do not qualify for the aid of the Fourth Amendment.

This Court has held that fingerprints are subject to the requirements of the Search and Seizure Clause of the Fourth Amendment, Davis v Mississippi, supra. On the other hand, facial scars, birthmarks, and other facial features have been said to be "in plain view" and not protected. United States v Doe (Schwartz), 457 F2d 895.

In Davis, the sheriff in Mississippi rounded up 24 blacks when a rape victim described her assailant only as a young Negro. Each was fingerprinted and then released. Davis was presented to the victim but was not identified. He was jailed without probable cause, and only later did the FBI confirm that his fingerprints matched those on the window of the victim's home. The Court held that the fingerprints could not be admitted, as they were seized without reasonable grounds. "Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'" Davis v Mississippi, supra, at 726–727, 22 L Ed 2d 676. The dragnet effect in Dionisio, where approximately 20 people were subpoenaed

[410 US 27]

for purposes of identification, was just the kind of invasion that the Davis case sought to prevent. Facial features can be presented to the public regardless of the cooperation or compulsion of the owner of the features. But to get the exemplars, the individual must be involved. So, although a person's handwriting is used in everyday life and speech is the vehicle of normal social intercourse, when these personal characteristics are sought for purposes of identification, the Government enters the zone of privacy and, in my view, must make a showing of reasonableness before seizures may be made.

The Government contends that since the production was before the grand jury, a different standard of constitutional law exists because the grand jury has broad investigatory powers. Blair v United States, 250 US 273, 63 L Ed 979, 39 S Ct 468. Cf. United States v Bryan, 339 US 323, 94 L Ed 884, 70 S Ct 724. The Government concedes that the Fourth Amendment applies to the grand jury and prevents it from executing subpoenas duces tecum that are overly broad. Hale v Henkel, 201 US 43, 76, 50 L Ed 652, 26 S Ct 370. It asserts, however, that that is the limit of its application. But the Fourth Amendment is not so limited, as this Court has held in Davis, supra, and reiterated in Terry v Ohio, 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868, where it held that the Amendment comes into effect whether or not there is a fullblown search. The essential purpose is to extend its protection "wherever an individual may harbor a reasonable 'expectation of privacy.'" Id., at 9, 20 L Ed 2d 889.

Just as the nature of the Amendment rebels against the limits that the Government seeks to impose on its coverage, so does the nature of the grand jury itself. It was secured at Runnymede from King John as a cornerstone of the liberty of the people. It was to serve as a buffer between the state and the

offender. For no matter how obnoxious a person may be, the United States cannot prosecute for a felony without an indictment.

[410 US 28]

The individual is therefore protected by a body of his peers who have no axes to grind or any Government agency to serve. It is the only accusatorial body of the Federal Government recognized by the Constitution. "The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge."[2] Stirone v United States, 361 US 212, 218, 4 L Ed 2d 252, 80 S Ct 270. But here, as the Court of Appeals said, "It is evident that the grand jury is seeking to obtain the voice exemplars of the witnesses by the use of its subpoena powers because probable cause did not exist for their arrest or for some other, less unusual, method of compelling the production of the exemplars." In re Dionisio, 442 F2d 276, 280. See

[410 US 29]

Hannah v Larche, 363 US 420, 497–499, 4 L Ed 2d 1307, 80 S Ct 1502 (Douglas, J., dissenting). Are we to stand still and watch the prosecution evade its own constitutional restrictions on its powers by turning the grand jury into its agent? Are we to allow the Government to usurp powers that were granted to the people by the Magna Carta and codified in our Constitution? That will be the result of the majority opinion unless we continue to apply to the grand jury the protection of the Fourth Amendment.

As the Court stated in Hale v Henkel, 201 US, at 59, 50 L Ed 652, "the most valuable function of the grand jury" was "to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will."

The Court held in that case that the Fourth Amendment was applicable to grand jury proceedings and that a sweeping all-inclusive subpoena was "equally indefensible as a search warrant would be if couched in similar terms." Id., at 77, 50 L Ed 652.

Of course, the grand jury can require people to testify. Hale v Henkel makes plain that proceedings before the grand jury do not carry

2. As Mr. Justice Black said in In re Groban, 352 US 330, 346–347, 1 L Ed 2d 376, 77 S Ct 510:

"The traditional English and American grand jury is composed of 12 to 23 members selected from the general citizenry of the locality where the alleged crime was committed. They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury. Similarly the presence of the jurors offers a substantial safeguard against the officers' misrepresentation, unintentional or otherwise, of the witness' statements and conduct before the grand jury. The witness can call on the grand jurors if need be for their normally unbiased testimony as to what occurred before them." (Black, J., dissenting.)

Although that excerpt is from a dissent on the particular facts of the case, there could be no disagreement as to the accuracy of the description of the grand jury's historical function.

The tendency is for government to use shortcuts in its search for instruments more susceptible to its manipulation than is the historic grand jury. See Hannah v Larche, 363 US 420, 505, 4 L Ed 2d 1307, 80 S Ct 1502 (Douglas, J., dissenting); Jenkins v McKeithen, 395 US 411, 23 L Ed 2d 404, 89 S Ct 1843.

all of the impedimenta of a trial before a petit jury. To date, the grand jury cases have involved only testimonial evidence. To say, as the Government suggests, that nontestimonial evidence is free from any restraint imposed by the Fourth Amendment is to give those who today manipulate grand juries, vast and uncontrollable power.

The Executive, acting through a prosecutor, could not have obtained these exemplars as it chose, for as stated by the Court of Appeals for the Eighth Circuit, "We conclude that the taking of the handwriting exemplars . . . was a search and seizure under the Fourth Amendment." United States v Harris, 453 F2d 1317, 1319. As Katz v United States, supra, makes plain, the searches that may be made without prior approval by judge or magistrate

[410 US 30]

are "subject only to a few specifically established and well-delineated exceptions." 389 US, at 357, 19 L Ed 2d 576.

The showing required by the Court of Appeals in the Mara case was that the Government's showing of need for the exemplars be "reasonable," which "is not necessarily synonymous with probable cause." 454 F2d 580, 584. When we come to grand juries, probable cause in the strict Fourth Amendment meaning of the term does not have in it the same ingredients pointing toward guilt as it does in the arrest and trial of people. In terms of probable cause in the setting of the grand jury, the question is whether the exemplar sought is in some way connected with the suspected criminal activity under investigation. Certainly less than that showing would permit the Fourth Amendment to be robbed of all of its vitality.

In the Mara case, the prosecutor submitted to the District Court an affidavit of a Government investigator stating the need for the exemplar based on his investigation. The District Court passed on the matter in camera, not showing the affidavit to either respondent or his counsel. The Court of Appeals, relying on Alderman v United States, 394 US 165, 183, 22 L Ed 2d 176, 89 S Ct 961, held that in such cases there should be an adversary proceeding. 454 F2d, at 582–583. If "reasonable cause" is to play any function in curbing the executive appetite to manipulate grand juries, there must be an opportunity for a showing that there was no "reasonable cause." As we stated in Alderman: "Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth

[410 US 31]

Amendment exclusionary rule demands." 394 US, at 184, 22 L Ed 2d 176.

The District Court in the Dionisio case went part way by allowing the witness to have his counsel present when the voice exemplars were prepared in the prosecutor's office. 442 F2d, at 278. The Court of Appeals acted in a traditionally fair way when it ruled that the reasonableness of a prosecutor's request for exemplars be put down for an adversary hearing before the District Court. It would be a travesty of justice to allow the prosecutor to do under the cloak of the grand jury what he could not do on his own.

In view of the disposition which I would make of these cases, I need not reach the Fifth Amendment question. But lest there be any doubt as to where I stand, I adhere to my position in United States v Wade, 388 US 218, 243, 18 L Ed 2d 1149, 87 S Ct 1926 (separate statement), and in Schmerber v California, 384 US 757, 773, 16 L Ed 2d 908, 86 S Ct 1826 (Black, J., dissenting, joined by Douglas, J.), 778, 16 L Ed 2d 908 (Douglas, J., dissenting), to the effect that the Fifth Amendment is not restricted to testimonial compulsion.

Mr. Justice **Marshall**, dissenting.*

I

The Court considers United States v Wade, 388 US 218, 221–223, 18 L Ed 2d 1149, 87 S Ct 1926 (1967), and Gilbert v California, 388 US 263, 265–267, 18 L Ed 2d 1178, 87 S Ct 1951 (1967), dispositive of respondent Dionisio's contention that compelled production of a voice exemplar would

[410 US 32]

violate his Fifth Amendment privilege against compulsory self-incrimination. Respondent Mara also argued below that compelled production of the handwriting and printing exemplars sought from him would violate his Fifth Amendment privilege. I assume the Court would consider Wade and Gilbert to be dispositive of that claim as well.[1] The Court reads those cases as holding that voice and handwriting exemplars may be sought for the exclusive purpose of measuring "the physical properties" of the witness' voice or handwriting without running afoul of the Fifth Amendment privilege. Ante, at 7, 35 L Ed 2d 75. Such identification evidence is not within the purview of the Fifth Amendment, the Court says, for, at least since Schmerber v California, 384 US 757, 764, 16 L Ed 2d 908, 86 S Ct 1826 (1966), it has been clear that while "the privilege is a bar against compelling 'communications' or 'testimony,' . . . compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it."

I was not a Member of this Court when Wade and Gilbert were decided. Had I been, I would have found it most difficult to join those decisions insofar as they dealt with the Fifth Amendment privilege. Since, as I discuss in Part II, I consider the Fourth Amendment to require affirmance of the decisions below in these cases, I need not rely at this time upon the Fifth Amendment privilege. Nevertheless, I feel constrained to express here at least my serious reservations concerning the Fifth Amendment portions of Wade and Gilbert, since those decisions are so central to the Court's result today.

The root of my difficulty with Wade and Gilbert is the testimonial evidence limitation that has been imposed upon the Fifth Amendment privilege in the decisions of this Court. That limitation is at odds with

[410 US 33]

what I have always understood to be the function of the privilege. I would, of course, include testimonial evidence within the privilege, but I have grave difficulty drawing a line there. For I cannot accept the

* Editor's Note: This opinion also applies to United States v Mara (No. 71–850), p 99, infra.

1. Before this Court, respondent Mara has argued only that the Government may be seeking the handwriting exemplars to obtain not merely identification evidence, but incriminating "testimonial" evidence. I certainly agree with the Court that if respondent's contention proves correct, he will be entitled to assert his Fifth Amendment privilege.

notion that the Government can compel a man to cooperate affirmatively in securing incriminating evidence when that evidence could not be obtained without the cooperation of the suspect. Indeed, until Wade and Gilbert, the Court had never carried the testimonial limitation so far as to allow law enforcement officials to enlist an individual's overt assistance—that is, to enlist his will—in incriminating himself. And I remain unable to discern any substantial constitutional footing on which to rest that limitation on the reach of the privilege.

Certainly it is difficult to draw very much support for the testimonial limitation from the language of the Amendment itself. The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." Nowhere is the privilege explicitly restricted to testimonial evidence. To read such a limitation into the privilege through its reference to "witness" is just the sort of crabbed construction of the provision that this Court long eschewed. Thus, some 80 years ago the Court rejected the contention that a grand jury witness could not invoke the privilege because it applied, in terms, only in a "criminal case." Counselman v Hitchcock, 142 US 547, 562, 35 L Ed 1110, 12 S Ct 195 (1892). The Court emphasized that the privilege "is as broad as the mischief against which it seeks to guard." Ibid. Even earlier, the Court, in holding that the privilege could be invoked in the context of a civil forfeiture proceeding, had warned that:

> "Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation
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> [410 US 34]
>
> of the right, as if it consisted more in sound than in substance." Boyd v United States, 116 US 616, 635, 29 L Ed 746, 6 S Ct 524 (1886).

Moreover, Boyd itself, which involved a subpoena directed at private papers, makes clear that "witness" is not to be restricted to the act of giving oral testimony against oneself. Rather, that decision suggests what I believe to be the most reasonable construction of the protection afforded by the privilege, namely, protection against being "compell[ed] . . . to furnish evidence against" oneself, id., at 637, 29 L Ed 746. See also Schmerber v California, 384 US, at 776–777, 16 L Ed 2d 908 (Black, J., dissenting).

Such a construction is dictated by the purpose of the privilege. In part, of course, the privilege derives from the view that certain forms of compelled evidence are inherently unreliable. See, e.g., In re Gault, 387 US 1, 47, 18 L Ed 2d 527, 87 S Ct 1428 (1967). But the privilege—as a constitutional guarantee subject to invocation by the individual—is obviously far more than a rule concerned simply with the probative force of certain evidence. Its roots "tap the basic stream of religious and political principle [and reflect] the limits of the individual's attornment to the state . . . ." Ibid. Its "constitutional foundation . . . is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load' . . . , to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence

against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." Miranda v Arizona, 384 US 436, 460, 16 L Ed 2d 694, 86 S Ct 1602, 10 ALR3d 974 (1966). Cf. also Rogers v Richmond, 365 US 534, 540–541, 5 L Ed 2d 760, 81 S Ct 735 (1961). It is only by prohibiting the Government from compelling an individual to cooperate

[410 US 35]

affirmatively in securing incriminating evidence which could not be obtained without his active assistance, that "the inviolability of the human personality" is assured. In my view, the testimonial limitation on the privilege simply fails to take account of this purpose.

The root of the testimonial limitation seems to be Mr. Justice Holmes' opinion for the Court in Holt v United States, 218 US 245, 54 L Ed 1021, 31 S Ct 2 (1910). In Holt, the defendant challenged the admission at trial of certain testimony that a blouse belonged to the defendant. A witness testified that defendant put on the blouse and that it fitted him. The defendant argued that this testimony violated his Fifth Amendment privilege because he had acted under duress. In the course of disposing of the defendant's argument, Mr. Justice Holmes said that "the prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material." Id., at 252–253, 54 L Ed 1021. This remark can only be considered dictum, however, for the case arose before this Court established the rule that illegally seized evidence may not be admitted in federal court, see Weeks v United States, 232 US 383, 58 L Ed 652, 34 S Ct 341 (1914), and thus Holt's claim of privilege was ultimately disposed of simply on the ground that "when [a man] is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent. Adams v New York, 192 US 585 [48 L Ed 575, 24 S Ct 372]." 218 US, at 253, 54 L Ed 245.

With its decision in Schmerber, however, the Court elevated the dictum of Holt to full constitutional stature. Mr. Justice Holmes' language was central to the Court's conclusion that the taking of a blood sample, over the objection of the individual, to determine alcoholic content was not barred by the Fifth Amendment privilege since

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the resulting blood test evidence "was neither [the individual's] testimony nor evidence relating to some communicative act . . . ." 384 US, at 765, 16 L Ed 2d 908. Indeed, the Court appeared to consider it established since Holt that the Fifth Amendment privilege extended only to " 'testimony' " or " 'communications,' " but not to " 'real or physical evidence.' " id., at 764, 16 L Ed 2d 908; and this "established" principle was sufficient, for the Court, to dispose of any "loose dicta" in Miranda that might suggest a more extensive purpose for the privilege.

After Schmerber, Wade and Gilbert were relatively easy steps for a Court focusing exclusively on the nature of the evidence compelled. Thus, the Court indicated that "compelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber," was "no different from compelling Schmerber to provide a blood sample or Holt to wear the blouse." 388 US, at 222, 18 L Ed 2d 1149. Similarly, in Gilbert, 388 US, at 266–267, 18 L Ed 2d 1178,

the Court reasoned that "[a] mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the privilege's] protection."

Yet, if we look beyond the testimonial limitation, Wade and Gilbert clearly were not direct and easy extensions of Schmerber and Holt. For it is only in Wade and Gilbert that the Court, for the first time, held in effect that an individual could be compelled to give to the State evidence against himself which could be secured only through his affirmative cooperation—that is, "to accuse himself by a volitional act which differs only in degree from compelling him to act out the crime," Wade v United States, 388 US, at 261, 18 L Ed 2d 1149 (Fortas, J., concurring in part and dissenting in part). The voice and handwriting samples sought in Wade and Gilbert simply could not be obtained without the individual's

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active cooperation. Holt and Schmerber were certainly not such cases. In those instances the individual was required, at most, to submit passively to a blood test or to the fitting of a shirt. Whatever the reasoning of those decisions, I do not understand them to involve the sort of interference with an individual's personality and will that the Fifth Amendment privilege was intended to prevent. To be sure, in situations such as those presented in Holt and Schmerber the individual may resist and be physically subdued, and in that sense, compulsion may be employed. Or, alternatively, the individual in those situations may elect to yield to the threat of contempt and cooperate affirmatively with his accusers, thus eliminating the need for force and, in that sense, his will may be subverted. But in neither case is the intrusion on an individual's dignity the same or as severe as the affront that occurs when the state secures from him incriminating evidence that can be obtained *only* by enlisting the cooperation of his will. Thus, I do not necessarily consider the results in Holt and Schmerber to be inconsistent with the purpose and proper reach of the Fifth Amendment privilege.[2]

But so long as we have a Constitution which protects at all costs the integrity of individual volition against subordinating state power, Wade and Gilbert must be viewed as legal anomalies. As Mr. Justice Fortas, joined by Mr. Justice Douglas and the Chief Justice, argued on the day those cases were decided:

> "Our history and tradition teach and command that an accused may stand mute. The privilege means just that; not less than that. According to the
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> [409 US 38]
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> Court, an accused may be jailed—indefinitely—until he is willing to say, for an identifying audience, whatever was said in the course of the commission of the crime. Presumably this would include, 'Your money or your life'—or perhaps, words of assault in a rape case. This is intolerable under our constitutional system." United States v Wade, 388 US, at 260, 18 L Ed 2d 1149.

See also Gilbert v California, 388 US, at 291–292, 18 L Ed 2d 1178 (Fortas, J., concurring in part, and dissenting in part).

2. This is not to say that, apart from the Fifth Amendment privilege, there might not be serious due process problems with physical compulsion applied to an individual's person to secure identifying evidence against his will. Cf. Rochin v California, 342 US 165, 96 L Ed 183, 72 S Ct 205, 25 ALR2d 1396 (1952). But cf. Breithaupt v Abram, 352 US 432, 1 L Ed 2d 448, 77 S Ct 408 (1957).

I fear the Court's decisions today are further illustrations of the extent to which the Court has gone astray in defining the reach of the Fifth Amendment privilege and has lost touch with the Constitution's concern for the "inviolability of the human personality." In both these cases, the Government seeks to secure possibly incriminating evidence that can be acquired only with respondents' affirmative cooperation. Thus, even if I did not consider the Fourth Amendment to require affirmance of the decisions of the Court of Appeals, I would nevertheless find it extremely difficult to accept a reversal of those decisions in the face of what seems to me the proper construction of the Fifth Amendment privilege.

II

The Court concludes that the exemplars sought from the respondents are not protected by the Fourth Amendment because respondents have surrendered their expectation of privacy with respect to voice and handwriting by knowingly exposing these to the public, see Katz v United States, 389 US 347, 351, 19 L Ed 2d 576, 88 S Ct 507 (1967). But, even accepting this conclusion, it does not follow that the investigatory seizures of respondents, accomplished through the use of subpoenas ordering them to appear before the grand jury—and thereby necessarily interfering

[409 US 39]

with their personal liberty—are outside the protection of the Fourth Amendment. To the majority, though, "[i]t is clear that a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense, even though that summons may be inconvenient or burdensome." Ante, at 9, 35 L Ed 2d at 76. With due respect, I find nothing "clear" about so sweeping an assertion.

There can be no question that investigatory seizures effected by the police are subject to the constraints of the Fourth and Fourteenth Amendments. In Davis v Mississippi, 394 US 721, 727, 22 L Ed 2d 676, 89 S Ct 1394 (1969), the Court observed that only the Term before, in Terry v Ohio, 392 US 1, 19, 20 L Ed 2d 889, 88 S Ct 1868 (1968), it had rejected "the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'" As a result, the Court held in Davis that investigatory seizures for the purpose of obtaining fingerprints are subject to the Fourth Amendment even though fingerprints themselves are not protected by that Amendment.[3] The Court now seems to distinguish Davis from the present cases, in part, on the ground that in Davis the authorities engaged in a lawless dragnet of a large number of Negro youths. Certainly, the peculiarly offensive exercise of investigatory powers in Davis heightened the Court's sensitivity to the dangers inherent in Mississippi's argument that the Fourth Amendment was not applicable to investigatory seizures. But the presence of a dragnet was not the constitutional determinant there; rather, it was police interference with the petitioner's own liberty that brought the Fourth and Fourteenth

[410 US 40]

Amendments into

3. We left open the further question whether such an investigatory seizure might, under certain circumstances, be made on information insufficient to establish probable cause to arrest. See 394 US, at 727–728, 22 L Ed 2d 676.

play, as should be evident from the Court's substantial reliance on Terry which involved no dragnet.

Like Davis, the present cases involve official investigatory seizures that interfere with personal liberty. The Court considers dispositive, however, the fact that the seizures were effected by the grand jury, rather than the police. I cannot agree.

First, in Hale v Henkel, 201 US 43, 76, 50 L Ed 652, 26 S Ct 370 (1906), the Court held that a subpoena duces tecum ordering "the production of books and papers [before a grand jury] may constitute an unreasonable search and seizure within the Fourth Amendment," and on the particular facts of the case, it concluded that the subpoena was "far too sweeping in its terms to be regarded as reasonable." Considered alone, Hale would certainly seem to carry a strong implication that a subpoena compelling an individual's personal appearance before a grand jury, like a subpoena ordering the production of private papers, is subject to the Fourth Amendment standard of reasonableness. The protection of the Fourth Amendment is not, after all, limited to personal "papers," but extends also to "persons," "houses," and "effects." It would seem a strange hierarchy of constitutional values that would afford papers more protection from arbitrary governmental intrusion than people.

The Court, however, offers two interrelated justifications for excepting grand jury subpoenas directed at "persons," rather than "papers," from the constraints of the Fourth Amendment. These are a "historically grounded obligation of every person to appear and give his evidence before the grand jury," ante, at 9–10, 35 L Ed 2d at 77, and the relative unintrusiveness of the grand jury subpoena on an individual's liberty.

In my view, the Court makes more of history than is justified. The Court treats the "historically grounded

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obligation" which it now discerns as extending to all "evidence," whatever its character. Yet, so far as I am aware, the obligation "to appear and give evidence" has heretofore been applied by this Court only in the context of testimonial evidence, either oral or documentary. Certainly the decisions relied upon by the Court, despite some dicta, have not recognized an obligation of a broader sweep.

Blair v United States, 250 US 273, 281, 63 L Ed 979, 39 S Ct 468 (1919), indicated only that "the giving of *testimony* and the attendance upon court or grand jury in order to *testify* are public duties which every person . . . is bound to perform upon being properly summoned . . . ." (Emphasis added.) Similarly, just last Term, the Court reaffirmed only that "[t]he power of government to compel persons to *testify* in court or before grand juries and other governmental agencies is firmly established in Anglo-American jurisprudence," nothing more. Kastigar v United States, 406 US 441, 443, 32 L Ed 2d 212, 92 S Ct 1653 (1972) (emphasis added). And, Mr. Chief Justice Hughes described "one of the duties which the citizen owes to his government" to be that of "attending its courts and giving his *testimony* whenever he is properly summoned. . . ." Blackmer v United States, 284 US 421, 438, 76 L Ed 375, 52 S Ct 252 (1932). (Emphasis added). In short, history, at least insofar as heretofore reflected in this Court's cases, does not necessarily establish an obligation to appear

before a grand jury for other than testimonial purposes. See Branzburg v Hayes, 408 US 665, 33 L Ed 2d 626, 92 S Ct 2646 (1972); Ullmann v United States, 350 US 422, 439 n 15, 100 L Ed 511, 76 S Ct 497, 53 ALR2d 1008 (1956); Piemonte v United States, 367 US 556, 559 n 2, 6 L Ed 2d 1028, 81 S Ct 1720 (1961); Wilson v United States, 221 US 361, 372, 55 L Ed 771, 31 S Ct 538 (1911); Hale v Henkel, 201 US, at 65, 50 L Ed 652. See also United States v Bryan, 339 US 323, 331, 94 L Ed 884, 70 S Ct 724 (1950); Brown v Walker, 161 US 591, 600, 40 L Ed 819, 16 S Ct 644 (1896); Garland v Torre, 259 F2d 545, 549 (CA2), cert denied, 358 US 910, 3 L Ed 2d 231, 79 S Ct 237 (1958).

[410 US 42]

In the present cases—as the Court itself argues in its discussion of the Fifth Amendment privilege—it was not testimony that the grand juries sought from respondents, but physical evidence. The Court glosses over this important distinction from its prior decisions, however, by artificially bifurcating its analysis of what is taking place in these cases—that is, by effectively treating what is done with individuals once they are before the grand jury as irrelevant in determining what safeguards are to govern the procedures by which they are initially compelled to appear. Nonetheless, the fact remains that the historic exception to which the Court resorts is not necessarily as broad as the context in which it is now employed. Hence, I believe that the question we must consider is whether an extension of that exception is warranted, and if so, under what conditions.

In approaching these questions, we must keep in mind that "[t]his Court has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment '. . . are to be regarded as of the very essence of constitutional liberty . . . .'" Harris v United States, 331 US 145, 150, 91 L Ed 1399, 67 S Ct 1098 (1947). As a rule, the Amendment stands as an essential bulwark against arbitrary and unreasonable governmental intrusion—whatever its form, whatever its purpose, see, e.g., Camara v Municipal Court, 387 US 523, 18 L Ed 2d 930, 87 S Ct 1727 (1967)—upon the privacy and liberty of the individual, see, e.g., Terry v Ohio, 392 US, at 9, 20 L Ed 2d 889; Jones v United States, 362 US 257, 261, 4 L Ed 2d 697, 80 S Ct 725, 78 ALR2d 233 (1960). Given the central role of the Fourth Amendment in our scheme of constitutional liberty, we should not casually assume that governmental action which may result in interference with individual liberty is excepted from its requirements. Cf. Coolidge v New Hampshire, 403 US 443, 455, 29 L Ed 2d 564, 91 S Ct 2022 (1971); Katz v United States, 389 US, at 357, 19 L Ed 2d 576; Camara v Municipal Court, supra, at 528–529, 18 L Ed 2d 930. The reason for any exception

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to the coverage of the Amendment must be fully understood and the limits of the exception should be defined accordingly. To do otherwise would create a danger of turning the exception into the rule and lead to the "impairment of the rights for the protection of which [the Amendment] was adopted," Go-Bart Importing Co. v United States, 282 US 344, 357, 75 L Ed 374, 51 S Ct 153 (1931); cf. Grau v United States, 287 US 124, 128, 77 L Ed 212, 53 S Ct 38 (1932).

The Court seems to reason that the exception to the Fourth Amendment for grand jury subpoenas directed at persons is justified by the relative unintrusiveness of the grand jury process on an individual's liberty. The Court, adopting Chief Judge Friendly's analysis in United States v Doe (Schwartz), 457 F2d 895, 898 (CA2 1972), suggests that arrests or even investigatory "stops" are inimical to personal liberty because they may involve the use of force; they may be carried out in demeaning circumstances; and at least an arrest may yield the social stigma of a record. By contrast, we are told, a grand jury subpoena is a simple legal process, that is served in an unoffensive manner; it results in no stigma; and a convenient time for appearance may always be arranged. The Court would have us believe, in short, that, unlike an arrest or an investigatory "stop," a grand jury subpoena entails little more inconvenience than a visit to an old friend. Common sense and practical experience indicate otherwise.

It may be that service of a grand jury subpoena does not involve the same potential for momentary embarrassment as does as arrest or investigatory "stop."[4] But this difference seems inconsequential in comparison to the substantial stigma that—contrary to the Court's assertion—may result from a grand jury appearance as well as from an arrest or investigatory seizure. Public

[410 US 44]

knowledge that a man has been summoned by a federal grand jury investigating, for instance, organized criminal activity can mean loss of friends, irreparable injury to business, and tremendous pressures on one's family life. Whatever nice legal distinctions may be drawn between police and prosecutor, on the one hand, and the grand jury, on the other, the public often treats an appearance before a grand jury as tantamount to a visit to the station house. Indeed, the former is frequently more damaging than the latter, for a grand jury appearance has an air of far greater gravity than a brief visit "downtown" for a "talk." The Fourth Amendment was placed in our Bill of Rights to protect the individual citizen from such potentially disruptive governmental intrusion into his private life unless conducted reasonably and with sufficient cause.

Nor do I believe that the constitutional problems inherent in such governmental interference with an individual's person are substantially alleviated because one may seek to appear at a "convenient time." In Davis v Mississippi, 394 US, at 727, 22 L Ed 2d 676, it was recognized that an investigatory detention effected by the police "need not come unexpectedly or at an inconvenient time." But this fact did not suggest to the Court that the Fourth Amendment was inapplicable; it was considered to affect, at most, the type of showing a State would have to make to justify constitutionally such a detention, see ibid. No matter how considerate a grand jury may be in arranging for an individual's appearance, the basic fact remains that his liberty has been officially restrained for some period of time. In terms of its effect on the individual, this restraint does not differ meaningfully from the restraint imposed on a suspect compelled to visit the police station house. Thus, the nature of the intrusion on personal liberty caused by a grand jury subpoena cannot, without more, be considered sufficient basis for denying

4. But cf. Davis v Mississippi, 394 US, 721, 727, 22 L Ed 2d 676, 89 S Ct 1394 (1969).

[410 US 45]

respondents the protection of the Fourth Amendment.

Of course, the Fourth Amendment does not bar all official seizures of the person, but only those that are unreasonable and are without sufficient cause. With this in mind, it is possible, at least, to explain, if not justify, the failure to apply the protection of the Fourth Amendment to grand jury subpoenas requiring individuals to appear and *testify*. Thus, while it is true that we have traditionally given the grand jury broad investigatory powers, particularly in terms of compelling the appearance of persons before it, see, e.g., Branzburg v Hayes, 408 US, at 688, 701–702, 33 L Ed 2d 626; Blair v United States, 250 US, at 282, 63 L Ed 979, it must be understood that we have done so in heavy reliance on certain essential assumptions.

Certainly the most celebrated function of the grand jury is to stand between the government and the citizen and thus to protect the latter from harassment and unfounded prosecution. See, e.g., Wood v Georgia, 370 US 375, 390, 8 L Ed 2d 569, 82 S Ct 1364 (1962); Hoffman v United States, 341 US 479, 485, 95 L Ed 1118, 71 S Ct 814 (1951); Ex parte Bain, 121 US 1, 11, 30 L Ed 849, 7 S Ct 781 (1887). The grand jury does not shed those characteristics that give it insulating qualities when it acts in its investigative capacity. Properly functioning, the grand jury is to be the servant of neither the Government nor the courts, but of the people. Hale v Henkel, 201 US, at 61, 50 L Ed 652. As such, we assume that it comes to its task without bias or self-interest. Unlike the prosecutor or policeman, it has no election to win or executive appointment to keep. The anticipated neutrality of the grand jury, even when acting in its investigative capacity, may perhaps be relied upon to prevent unwarranted interference with the lives of private citizens and to ensure that the grand jury's subpoena powers over the person are exercised in only a reasonable fashion. Under such circumstances, it may be justifiable to give the grand jury broad personal subpoena powers that are outside the purview

[410 US 46]

of the Fourth Amendment, for—in contrast to the police—it is not likely that it will abuse those powers.[5] Cf. Costello v United States, 350 US 359, 362, 100 L Ed 397, 76 S Ct 406 (1956); Stirone v United States, 361 US 212, 218, 4 L Ed 2d 252, 80 S Ct 270 (1960).

Whatever the present day validity of the historical assumption of neutrality that underlies the grand jury process,[6] it must at least be recognized that if a grand jury is deprived of the independence essential to the assumption of neutrality—if it effectively surrenders that independence to a prosecutor—the dangers of excessive and unreasonable official interference with personal liberty are exactly those that the Fourth Amendment was intended to prevent. So long as the grand jury carries on its investigatory activities only through the mechanism of testimonial inquiries, the danger of such official usurpation of the grand jury process may not be unreasonably great. Individuals called to testify before the

5. When the grand jury does overstep its power and acts maliciously, courts are certainly not totally without power to control it. See n 9, infra.

6. Indeed, the Court today acknowledges that "[t]he grand jury may not always serve its historic role as a protective bulwark." Ante, at 17, 35 L Ed 2d at 81.

grand jury will have available their Fifth Amendment privilege against self-incrimination. Thus, at least insofar as incriminating information is sought directly from a particular criminal suspect,[7] the grand jury process would not appear to offer law enforcement officials a substantial advantage over ordinary investigative techniques.

[410 US 47]

But when we move beyond the realm of a grand jury investigation limited to testimonial inquiries, as the Court does today, the danger increases that law enforcement officials may seek to usurp the grand jury process for the purpose of securing incriminating evidence from a particular suspect through the simple expedient of a subpoena. In view of the Court's Fourth Amendment analysis of the respondents' expectations of privacy concerning their handwriting and voice exemplars, and in view of the testimonial evidence limitation on the reach of the Fifth Amendment privilege, there is essentially no objection to be made once a suspect is before the grand jury and exemplars are requested. Thus, if the grand jury may summon criminal suspects for such purposes without complying with the Fourth Amendment, it will obviously present an attractive investigative tool to prosecutor and police. For what law enforcement officers could not accomplish directly themselves after our decision in Davis v Mississippi, they may now accomplish indirectly through the grand jury process.

Thus, the Court's decisions today can serve only to encourage prosecutorial exploitation of the grand jury process, at the expense of both individual liberty and the traditional neutrality of the grand jury. Indeed, by holding that the grand jury's power to subpoena these respondents for the purpose of obtaining exemplars is completely outside the purview of the Fourth Amendment, the Court fails to appreciate the essential difference between real and testimonial evidence in the context of these cases, and thereby hastens the reduction of the grand jury into simply another investigative device of law enforcement officials. By contrast, the Court of Appeals, in proper recognition of these dangers, imposed narrow limitations on the subpoena power of the grand jury that are necessary to guard against unreasonable

[410 US 48]

official interference with individual liberty but that would not impair significantly the traditional investigatory powers of that body.

The Court of Appeals in Mara, 410 US 19, 35 L Ed 2d 99, 93 S Ct 774, did not impose a requirement that the Government establish probable cause to support a grand jury's request for exemplars. It correctly recognized that "examination of witnesses by a grand jury need not be preceded by a formal charge against a particular individual," since the very purpose of the grand jury process is to ascertain probable cause, see, e.g., Blair v United States, 250 US, at 282, 63 L Ed 979; Hendricks v United States, 223 US 178, 184, 56 L Ed 394, 32 S Ct 313, 454 F2d 580, 584 (1912). Consistent with this Court's decision in Hale v Henkel, the Court of Appeals

7. Of course, the grand jury does provide an important mechanism for investigating possible criminal activity through witnesses who may have first-hand knowledge of the activities of others. But given the Fifth Amendment privilege, it does not follow that the grand jury is a useful mechanism for securing incriminating testimony from the suspect himself.

ruled only that the request for physical evidence such as exemplars should be subject to a showing of reasonableness. See 201 US, at 76, 50 L Ed 652. This "reasonableness" requirement has previously been explained by this Court, albeit in a somewhat different context, to require a showing by the Government that: (1) "the investigation is authorized by Congress"; (2) the investigation "is for a purpose Congress can order"; (3) the evidence sought is "relevant"; and (4) the request is "adequate, but not excessive, for the purposes of the relevant inquiry." See Oklahoma Press Publishing Co. v Walling, 327 US 186, 209, 90 L Ed 614, 66 S Ct 494, 166 ALR 531 (1946). This was the interpretation of the "reasonableness" requirement properly adopted by the Court of Appeals. See 454 F2d, at 584–585. And, in elaborating on the requirement that the request not be "excessive," it added that the Government would bear the burden of showing that it was not conducting "a general fishing expedition under grand jury sponsorship." Id., at 585.

These are not burdensome limitations to impose on the grand jury when it seeks to secure physical evidence,

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such as exemplars, that has traditionally been gathered directly by law enforcement officials. The essence of the requirement would be nothing more than a showing that the evidence sought is relevant to the purpose of the investigation and that the particular grand jury is not the subject of prosecutorial abuse—a showing that the Government should have little difficulty making, unless it is in fact acting improperly. Nor would the requirement interfere with the power of the grand jury to call witnesses before it, to take their testimony, and to ascertain their knowledge concerning criminal activity. It would only discourage prosecutorial abuse of the grand jury process.[8] The "reasonableness" requirement would do no more in the context of these cases than the Constitution compels—protect the citizen from unreasonable and arbitrary governmental interference, and ensure that the broad subpoena powers of the grand jury which

[410 US 50]

the Court now recognizes are not turned into a tool of prosecutorial oppression.[9]

8. It is, of course, true that a suspect may be called for the dual purposes of testifying and obtaining physical evidence. Obviously, his liberty would be interfered with merely as a result of appearing and testifying, a situation in which the Fourth Amendment has not heretofore been applied. But it does not follow that the application of the Fourth Amendment is inappropriate when a suspect is subpoenaed for these dual purposes. The application of the Fourth Amendment is necessary to discourage unreasonable use of the grand jury process by law enforcement officials. While the Fifth Amendment privilege at least contributes to that goal in the context of a subpoena intended to secure both testimonial and physical evidence, it is essential also to apply the Fourth Amendment when the suspect is requested to give physical evidence. Otherwise, subpoenaing suspects for the purpose of testifying would provide a simple guise by which law enforcement officials might secure physical evidence without complying with the Fourth Amendment, and thus the deterrent effect on such officials sought by applying the Amendment to grand jury subpoenas seeking physical evidence would be lost.

9. It may be that my differences with the Court are not as great as may first appear, for despite the Court's rejection of the applicability of the Fourth Amendment to grand jury subpoenas directed at "persons," it clearly recognizes that abuse of the grand jury process is not outside a court's control. See ante, at 11–12, 35 L Ed 2d 77, 78. Besides the Fourth Amendment, the First Amendment and both the

In Dionisio, No. 71–229, the Government has never made any showing that would establish the "reasonableness" of the grand jury's request for a voice sample. In Mara, No. 71–850, the Government submitted an affidavit to the District Court to justify the request for the handwriting and printing exemplars. But it was not sufficient to meet the requirements set down by the Court of Appeals. See 454 F2d, at 584–585. Moreover, the affidavit in Mara was reviewed by the District Court in camera in the absence of respondent Mara and his counsel. Such ex parte procedures should be the exception, not the rule.

> "Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment . . . demands."[10] Alderman v United States, 394 US 165, 184, 22 L Ed 2d 176, 89 S Ct 961 (1969).
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> [410 US 51]

See also Dennis v United States, 384 US 855, 873–875, 16 L Ed 2d 973, 86 S Ct 1840 (1966). Consequently, I agree with the Court of Appeals that the reasonableness of a request for an exemplar should be tested in an adversary context.[11]

I would, therefore, affirm the Court of Appeals' decisions reversing the judgments of contempt against respondents and order the cases remanded to the District Court to allow the Government an opportunity to make the requisite showing of "reasonableness" in each case. To do less is to invite the very sort of unreasonable governmental intrusion on individual liberty that the Fourth Amendment was intended to prevent.

Due Process Clause and the privilege against compulsory self-incrimination contained in the Fifth Amendment erect substantial barriers to "the transformation of the grand jury into an instrument of oppression." Ibid. See also Hale v Henkel, 201 US, at 65, 50 L Ed 652; United States v Doe (Schwartz), 457 F2d 895, 899.

10. As the Court of Appeals observed: "[D]ifficulties of locating a suspect or possessor of evidence, the problems of apprehension, the destructibility of evidence, the need for promptness to protect the public against violence and to prevent repetition of criminal conduct necessitate the ex parte nature of the warrant issuance proceeding." 454 F2d 580, 583.

But these considerations do not apply in the context of a grand jury request for exemplars. Nevertheless, the Government contends that the traditional secrecy of the grand jury process dictates that any preliminary showing required of it should be made in an ex parte, in camera proceeding. However, the interests served by the secrecy of the grand jury process can be adequately protected without such a drastic measure, see id., at 584.

11. The Court suggests that any sort of showing that might be required of the Government in cases such as these "would saddle a grand jury with mini trials" and "would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." Ante, at 17, 35 L Ed 2d at 81. But constitutional rights cannot be sacrificed simply for expedition and simplicity in the administration of the criminal laws. Moreover, a requirement that the Government establish the "reasonableness" of the request for an exemplar would hardly be so burdensome as the Court suggests. As matters stand, if the suspect resists the request, the Government must seek a judicial order directing that he comply with the request. Thus, a formal judicial proceeding is already necessary. The question whether the request is "reasonable" would simply be one further matter to consider in such a proceeding.

[467 US 735]

SECURITIES AND EXCHANGE COMMISSION, et al., Petitioners

v

JERRY T. O'BRIEN, INC., et al.

467 US 735, 81 L Ed 2d 615, 104 S Ct 2720

[No. 83–751]

Argued April 17, 1984. Decided June 18, 1984.

Decision: Target of SEC investigation held not entitled to notice of subpoenas issued to third parties.

SUMMARY

In a suit in the United States District Court for the Eastern District of Washington to enjoin a Securities and Exchange Commission investigation and to prevent an individual from complying with SEC subpoenas that had been issued to him, some parties expressly requested notice of the subpoenas issued by the SEC to third parties. The District Court denied the request for notice of subpoenas issued to third parties, but the United States Court of Appeals for the Ninth Circuit reversed (704 F2d 1065).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by MARSHALL, J., expressing the unanimous view of the court, it was held that the SEC need not notify the target of its nonpublic investigation into possible securities laws violations when issuing a subpoena to a third party, since such a requirement is not expressly included in any of the complex of statutes governing the SEC's investigative power, is not constitutionally mandated, is not inferable from the structure of the securities laws, and is not inferable from the general standards governing judicial enforcement of administrative subpoenas.

Briefs of Counsel, p 1028, infra.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Securities Regulation § 11 — investigations — notice

1a, 1b. The Securities and Exchange Commission need not notify the target of its nonpublic investigation into possible securities laws violations when issuing a subpoena to a third party.

Appeal and Error § 1262.5 — certiorari — cross petition

2a, 2b. On certiorari to review a United States Court of Appeals' ruling that targets of Securities and Exchange Commission investigations must be notified of SEC subpoenas issued to third parties, the validity of the Court of Appeals' ruling on the merits of the target-respondents' claims for injunctive relief with regard to subpoenas directed at themselves is not before the United States Supreme Court where the target-respondents have not cross-petitioned for certiorari.

Constitutional Law § 751; Criminal Law § 50 — agency subpoenas

3. Neither the due process clause of the Fifth Amendment nor the confrontation clause of the Sixth Amendment is offended when a federal administrative agency, without notifying a person under investigation, uses its subpoena power to gather evidence adverse to him.

Witnesses § 81 — subpoenas — third parties

4. A person inculpated by materials sought by a subpoena issued to a third party cannot seek shelter in the self-incrimination clause of the Fifth Amendment, since a subpoena does not compel anyone else to be a witness against himself.

Search and Seizure § 33 — who may complain

5. When a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object on Fourth Amendment grounds if the third party conveys that information or records thereof to law enforcement authorities.

SEC v JERRY T. O'BRIEN, INC.
467 US 735, 81 L Ed 2d 615, 104 S Ct 2720

SYLLABUS BY REPORTER OF DECISIONS

During its nonpublic investigation into possible violations of the federal securities laws involving respondents, the Securities and Exchange Commission (SEC) issued subpoenas to certain of the respondents for the production of financial records. Ultimately, respondents filed suit in Federal District Court to enjoin the SEC's investigation and to prevent compliance with some of the subpoenas. After the District Court dismissed the claims for injunctive relief, the SEC issued subpoenas to third parties. Respondents then renewed their requests to the District Court for injunctive relief and sought notice of the third-party subpoenas. The court denied the requested relief, but the Court of Appeals reversed with respect to the District Court's denial of respondents' request for notice of subpoenas issued to third parties.

Held: The SEC is not required to notify the "targets" of nonpublic investigations into possible violations of the securities laws when the SEC issues subpoenas to third parties. The SEC has discretion to determine when such notice would be appropriate and when it would not.

(a) Notice to "targets" is not required by any constitutional provision. When a federal administrative agency, without notifying a person under investigation, uses its subpoena power to gather evidence adverse to him, the Due Process Clause of the Fifth Amendment is not implicated because an administrative investigation adjudicates no legal rights, and the Confrontation Clause of the Sixth Amendment is not offended since it does not come into play until the initiation of criminal proceedings. Nor may a person inculpated by materials sought by a subpoena issued to a third party seek shelter in the Self-Incrimination Clause of the Fifth Amendment, since the subpoena does not "compel" anyone other than the person to whom it is directed to be a witness against himself. Finally, respondents cannot contend that notice of subpoenas issued to third parties is necessary to enable a "target" to prevent a search or seizure of his papers violative of the Fourth Amendment; when a person communicates information to a third party, even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities.

(b) The language and structure of the statutes administered by the SEC, particularly the Securities Act of 1933 and the Securities Exchange Act of 1934, do not support the imposition of a duty on the SEC to notify a "target" of an investigation when it issues a subpoena to a third party. The provisions vesting the SEC with the power to conduct investigations and to issue and seek enforcement of subpoenas are expansive, and no provision expressly obliges the SEC to notify "targets" when subpoenas are issued to third parties. Congress intended to vest the SEC with considerable discretion in determining when and how to investigate possible statutory violations, and there is no evidence that Congress expected the Commission to adopt any particular procedure for notifying "targets" when it sought information from third parties. The fact that Congress recently has imposed a carefully limited obligation on the SEC under the Right

to Financial Privacy Act to notify bank customers of administrative subpoenas issued to banks reinforces the conclusion that Congress assumed that the SEC was not and would not be subject to a general obligation to notify "targets" whenever it issued administrative subpoenas.

(c) Nor is a notice requirement justified on the ground, asserted by respondents, that a "target" has a substantive right to insist that administrative subpoenas issued to third parties meet the standards set forth in United States v Powell, 379 US 48, 13 L Ed 2d 112, 85 S Ct 248, and that, to enable the "target" to enforce this right by intervening in SEC enforcement actions against the subpoena recipients or by restraining the recipients' voluntary compliance, the "target" must be notified of the subpoenas. Even assuming, arguendo, that a "target" has such substantive and procedural rights, pragmatic considerations counsel against reinforcing those rights with a notice requirement. Administration of a notice requirement would be highly burdensome for both the SEC and the courts, particularly with regard to identification of the persons and organizations that should be considered "targets" of investigations. Moreover, the imposition of a notice requirement would substantially increase the ability of "targets" who have something to hide to impede legitimate SEC investigations by discouraging subpoena recipients from complying, or by destroying or altering documents, intimidating witnesses, or transferring securities or funds so that they could not be reached by the Government.

704 F2d 1065, reversed and remanded.

Marshall, J., delivered the opinion for a unanimous Court.

APPEARANCES OF COUNSEL

Kenneth S. Geller argued the cause for petitioners.

William D. Symmes argued the cause for respondents.

Briefs of Counsel, p 1028, infra.

OPINION OF THE COURT

[467 US 737]

Justice **Marshall** delivered the opinion of the Court.

[1a] The Securities and Exchange Commission (SEC or Commission) has statutory authority to conduct nonpublic investigations into possible violations of the securities laws and, in the course thereof, to issue subpoenas to obtain relevant information. The question before us is whether the Commission must notify the "target" of such an investigation when it issues a subpoena to a third party.

I

This case represents one shard of a prolonged investigation by the SEC into the affairs of respondent Harry F. Magnuson and persons and firms with whom he has dealt. The investigation began in 1980, when the Commission's staff reported to the Commission that information in their possession tended to show that Magnuson and others had been trading in the stock of specified mining companies in a manner violative of the registration, reporting, and antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. In response, the Commission issued a Formal

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Order

of Investigation[1] authorizing employees of its Seattle Regional Office to initiate a "private investigation" into the transactions in question and, if necessary, to subpoena testimony and documents "deemed relevant or material to the inquiry." Complaint, Exhibit A, pp. 3–4.

Acting on that authority, members of the Commission staff subpoenaed financial records in the possession of respondent Jerry T. O'Brien, Inc. (O'Brien), a broker-dealer firm, and respondent Pennaluna & Co. (Pennaluna). O'Brien voluntarily complied, but Pennaluna refused to disgorge the requested materials. Soon thereafter, in response to several inquiries by O'Brien's counsel, a member of the SEC staff informed O'Brien that it was a "subject" of the investigation.

O'Brien, Pennaluna, and their respective owners[2] promptly filed a suit in the District Court for the Eastern District of Washington, seeking to enjoin the Commission's investigation and to prevent Magnuson from complying with subpoenas that had been issued to him.[3] Magnuson filed a cross-claim, also seeking to block portions of the investigation.

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O'Brien then filed motions seeking authority to depose the Commission's officers and to conduct expedited discovery into the Commission's files.[4]

The District Court denied respondents' discovery motions and soon thereafter dismissed their claims for injunctive relief. Jerry T. O'Brien, Inc. v SEC, No. C-81-546 (ED Wash, Jan. 20, 1982). The principal ground for the court's decision was that respondents would have a full opportunity to assert their objections to the basis and scope of the SEC's investigation if and when the Commission instituted a subpoena enforcement action. The court did, however, rule that the Commission's outstanding subpoenas[5] met the requirements outlined in United States v Powell, 379 US 48, 13 L Ed 2d 112, 85 S Ct 248 (1964), for determining whether an administrative summons is judicially enforceable. Specifically, the District Court held that the Commis-

1. A Formal Order of Investigation is issued by the Commission only after its staff has conducted a preliminary inquiry, in the course of which "no process is issued [nor] testimony compelled." 17 CFR § 202.5(a) (1983). The purposes of such an order seem to be to define the scope of the ensuing investigation and to establish limits within which the staff may resort to compulsory process. See HR Rep No. 96-1321, pt 1, p 2 (1980).

2. The relationships between O'Brien, Pennaluna, and their individual owners are not fully elucidated by the papers before us. Because, for the purposes of this litigation, the interests of all of these respondents are identical, hereinafter they will be referred to collectively as O'Brien, except when divergence in their treatment by the courts below requires that they be differentiated.

3. The principal bases of O'Brien's suit were that the SEC's Formal Order of Investigation was defective, that the investigation did not have a valid purpose, that the Commission should have afforded the subjects of the investigation a chance to comment upon it, and that the issues around which the case revolved had been litigated and settled in another proceeding. Complaint 9–15.

4. During the pendency of the suit, the Commission, at the District Court's request, refrained from seeking enforcement of its outstanding subpoenas.

5. Because no subpoenas were then outstanding against Jerry T. O'Brien, Inc., or O'Brien in his personal capacity, the District Court declined to determine whether the Commission had complied with the Powell standards in demanding records from those respondents.

sion had a legitimate purpose in issuing the subpoenas, that the requested information was relevant and was not already in the Commission's possession, and that the issuance of the subpoenas comported with pertinent procedural requirements.

Following the District Court's decision, the SEC issued several subpoenas to third parties. In response, Magnuson and O'Brien renewed their request to the District Court for injunctive relief, accompanying the request with a motion, pursuant to Rule 62(c) of the Federal Rules of Civil Procedure, for a stay pending appeal. For the first time, respondents expressly sought notice of the subpoenas issued by the Commission to third parties. Reasoning that respondents lacked standing to challenge voluntary compliance with subpoenas

[467 US 740]

by third parties, and that, in any subsequent proceeding brought by the SEC, respondents could move to suppress evidence the Commission had obtained from third parties through abusive subpoenas, the District Court denied the requested relief. Jerry T. O'Brien, Inc. v SEC, Civ No. C-81-546 (ED Wash, Mar. 25, 1982).[6]

[2a] A panel of the Court of Appeals for the Ninth Circuit affirmed the District Court's denial of injunctive relief with regard to the subpoenas directed at respondents themselves, agreeing with the lower court that respondents had an adequate remedy at law for challenging those subpoenas.[7] 704 F2d 1065, 1066–1067 (1983). However, the Court of Appeals reversed the District Court's denial of respondents' request for notice of subpoenas issued to third parties. In the Court of Appeals' view, "targets" of SEC investigations "have a right to be investigated consistently with the Powell standards." Id., at 1068. To enable targets to enforce this right, the court held that they must be notified of subpoenas issued to others. Id., at 1069.

The Court of Appeals denied the Commission's request for rehearing and rejected its suggestion for rehearing en banc. 719 F2d 300 (1983). Judge Kennedy, joined by four other judges, dissented from the rejection, arguing that the panel decision was unprecedented and threatened the ability of the

[467 US 741]

SEC and other agencies to conduct nonpublic investigations into possible violations of federal law. Ibid.

We granted certiorari because of the importance of the issue presented. 464 US 1038, 79 L Ed 2d 163, 104 S Ct 697 (1984). We now reverse.

II

Congress has vested the SEC with

6. The District Court granted respondents a brief stay to enable them to petition the Court of Appeals for a longer stay pending disposition of the appeal, but the Court of Appeals refused to enjoin the Commission from proceeding with its investigation. The SEC then filed various subpoena enforcement actions. The Commission has prevailed in at least one of those suits, SEC v Magnuson, No. 82-1178-Z (Mass, Aug. 11, 1982) (enforcing subpoenas to Magnuson family members); another is still pending, see SEC v Magnuson, et al., No. C-82-282-RJM (ED Wash, filed Apr. 19, 1982). Cf. Magnuson v SEC, No. 82-2042 (Idaho, July 27, 1982) (rejecting motion by Magnuson and his wife to quash subpoenas directed to a financial institution).

7. **[2b]** Because respondents have not cross-petitioned, the validity of the Court of Appeals' ruling on the merits of respondents' claims for injunctive relief with regard to the subpoenas directed at themselves is not before us.

broad authority to conduct investigations into possible violations of the federal securities laws and to demand production of evidence relevant to such investigations. E.g., 15 USC §§ 77s(b), 78u(a)–(b) [15 USCS §§ 77s(b), 78u(a), (b)].[8] Subpoenas issued by the Commission are not self-enforcing, and the recipients thereof are not subject to penalty for refusal to obey. But the Commission is authorized to bring suit in federal court to compel compliance with its process. E.g., 15 USC §§ 77v(b), 78u(c) [15 USCS §§ 77v(b), 78u(c)].[9]

No provision in the complex of statutes governing the SEC's investigative power expressly obliges the Commission to notify the "target" of an investigation when it issues a subpoena to a third party. If such an obligation is to be imposed on the Commission, therefore, it must be derived from one of three sources: a constitutional provision; an understanding on the part of Congress, inferable from the structure of the securities laws, regarding how the SEC should conduct its inquiries; or the general standards governing judicial

[467 US 742]

enforcement of administrative subpoenas enunciated in United States v Powell, 379 US 48, 13 L Ed 2d 112, 85 S Ct 248 (1964), and its progeny. Examination of these three potential bases for the Court of Appeals' ruling leaves us unpersuaded that the notice requirement fashioned by that court is warranted.

A

[3] Our prior cases foreclose any constitutional argument respondents might make in defense of the judgment below. The opinion of the Court in Hannah v Larche, 363 US 420, 4 L Ed 2d 1307, 80 S Ct 1502 (1960), leaves no doubt that neither the Due Process Clause of the Fifth Amendment nor the Confrontation Clause of the Sixth Amendment is offended when a federal administrative agency, without notifying a person under investigation, uses its subpoena power to gather evidence adverse to him. The Due Process Clause is not implicated under such circumstances because an administrative investigation adjudicates no legal rights, id., at 440–443, 4 L Ed 2d 1307, 80 S Ct 1502, and the Confrontation Clause does not come into play until the initiation of criminal proceedings, id., at 440, n 16, 4 L Ed 2d 1307, 80 S Ct 1502. These principles plainly cover an inquiry by the SEC into possible violations of the securities laws.

[4] It is also settled that a person inculpated by materials sought by a subpoena issued to a third party

8. The provisions cited in the text are the pertinent provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934, respectively. In conducting the investigation that gives rise to this case, the Commission relied solely on those Acts. Many other statutes administered by the SEC contain similar provisions. See 15 USC § 79r [15 USCS § 79r] (Public Utility Holding Company Act of 1935); 15 USC § 77uuu(a) [15 USCS § 77uuu(a)] (Trust Indenture Act of 1939); 15 USC §§ 80a–41(a), (b) [15 USCS §§ 80a–41(a), (b)] (Investment Company Act of 1940); 15 USC §§ 80b-9(a), (b) [15 USCS §§ 80b-9(a), (b)] (Investment Advisers Act of 1940).

9. The analogous enforcement provisions for the other statutes administered by the Commission are: 15 USC § 79r(d) [15 USCS § 79r(d)] (Public Utility Holding Company Act of 1935); 15 USC § 77uuu(a) [15 USCS §§ 77uuu(a)] (incorporating by reference 15 USC § 77v(b) [15 USCS § 77v(b)]) (Trust Indenture Act of 1939); 15 USC §§ 80a–41(c) [15 USCS § 80a–41(c)] (Investment Company Act of 1940); 15 USC § 80b–9(c) [15 USCS §§ 80b–9(c)] (Investment Advisers Act of 1940).

cannot seek shelter in the Self-Incrimination Clause of the Fifth Amendment. The rationale of this doctrine is that the Constitution proscribes only *compelled* self-incrimination, and, whatever may be the pressures exerted upon the person to whom a subpoena is directed,[10] the subpoena surely does not "compel" anyone else to be a witness against himself. Fisher v United States, 425 US 391, 397, 48 L Ed 2d 39, 96 S Ct 1569 (1976); Couch v United States, 409 US 322, 328–329, 34 L Ed 2d 548, 93 S Ct 611 (1973). If the "target" of an investigation by the SEC has no Fifth Amendment right to challenge enforcement of a subpoena directed at a third

[467 US 743]

party, he clearly can assert no derivative right to notice when the Commission issues such a subpoena.

[5] Finally, respondents cannot invoke the Fourth Amendment in support of the Court of Appeals' decision. It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities. United States v Miller, 425 US 435, 443, 48 L Ed 2d 71, 96 S Ct 1619 (1976). Relying on that principle, the Court has held that a customer of a bank cannot challenge on Fourth Amendment grounds the admission into evidence in a criminal prosecution of financial records obtained by the Government from his bank pursuant to allegedly defective subpoenas, despite the fact that he was given no notice of the subpoenas. Id., at 443, and n 5, 48 L Ed 2d 71, 96 S Ct 1619.[11] See also Donaldson v United States, 400 US 517, 522, 27 L Ed 2d 580, 91 S Ct 534 (1971) (Internal Revenue summons directed to third party does not trench upon any interests protected by the Fourth Amendment).[12] These rulings disable respondents from arguing that notice of subpoenas issued to third parties is necessary to allow a target to prevent an unconstitutional search or seizure of his papers.

B

The language and structure of the statutes administered by the Commission afford respondents no greater aid. The provisions vesting the SEC with the power to issue and seek enforcement of subpoenas are expansive. For example, § 19(b)

[467 US 744]

of the Securities Act of 1933, 48 Stat 85-86, empowers the SEC to conduct investigations "which, in the opinion of the Commission, are necessary and proper for the enforcement" of the Act and to "require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry." 15 USC § 77s(b) [15 USCS § 77s(b)]. Similarly, §§ 21(a) and 21(b) of the Securities Exchange Act of 1934, 48 Stat 899, 900, autho-

10. Cf. United States v Doe, 465 US 605, 612-613, 79 L Ed 2d 552, 104 S Ct 1237 (1984).

11. It should be noted that any Fourth Amendment claims that might be asserted by respondents are substantially weaker than those of the bank customer in Miller because respondents, unlike the customer, cannot argue that the subpoena recipients were required by law to keep the records in question. Cf. 425 US, at 455–456, 48 L Ed 2d 71, 96 S Ct 1619 (Marshall, J., dissenting).

12. Cf. Donovan v Lone Steer, Inc., 464 US 408, 414-415, 78 L Ed 2d 567, 104 S Ct 769 (1984) (discussing the Fourth Amendment rights of the *recipient* of an administrative subpoena).

rize the Commission to "make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter [or] the rules or regulations thereunder" and to demand to see any papers "the Commission deems relevant or material to the inquiry." 15 USC §§ 78u(a), (b) [15 USCS §§ 78u(a), (b)].[13]

More generally, both statutes vest the SEC with "power to make such rules and regulations as may be necessary or appropriate to implement [their] provisions . . . ." 15 USC §§ 77s(a), 78w(a)(1) [15 USCS §§ 77s(a), 78w(a)(1)]. Relying on this authority, the SEC has promulgated a variety of rules governing its investigations, one of which provides that, "[u]nless otherwise ordered by the Commission, all formal investigative proceedings shall be non-public." 17 CFR § 203.5 (1983). In other words, the Commission has formally adopted the policy of not routinely informing anyone, including targets, of the existence and progress of its investigations.[14] To our knowledge, Congress has never questioned this exercise by the Commission of its statutory power. And, in another context, we have held that rulemaking authority comparable to that enjoyed by the SEC is broad enough to empower an agency to "establish

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standards for determining whether to conduct an investigation publicly or in private." FCC v Schreiber, 381 US 279, 292, 14 L Ed 2d 383, 85 S Ct 1459 (1965).

It appears, in short, that Congress intended to vest the SEC with considerable discretion in determining when and how to investigate possible violations of the statutes administered by the Commission. We discern no evidence that Congress wished or expected that the Commission would adopt any particular procedures for notifying "targets" of investigations when it sought information from third parties.

The inference that the relief sought by respondents is not necessary to give effect to congressional intent is reinforced by the fact that, in one special context, Congress has imposed on the Commission an obligation to notify persons directly affected by its subpoenas. In 1978, in response to this Court's decision in United States v Miller, supra,[15] Congress enacted the Right to Financial Privacy Act, 92 Stat 3697, 12 USC § 3401 et seq. [12 USCS §§ 3401 et seq.]. That statute accords customers of banks and similar financial institutions certain rights to be notified of and to challenge in court administrative subpoenas of financial records in the possession of the banks. The most salient feature of the Act is the narrow scope of the entitlements it creates. Thus, it carefully limits the kinds of customers to whom it applies, §§ 3401(4), (5), and the types of records they may seek

13. The other statutes administered by the SEC contain similarly broad delegations of investigatory power. See the provisions cited in n 8, supra.

14. In practice, virtually all investigations conducted by the Commission are nonpublic. See 3 L Loss, Securities Regulation 1955 (2d ed 1961); SEC, Report of the Advisory Committee on Enforcement Policies and Practices 18 (1972).

15. See HR Rep No. 95-1383, p 34 (1978) (the purpose of the statute is to fill the gap left by the ruling in Miller that a bank customer has "no standing under the Constitution to contest Government access to financial records").

to protect, § 3401(2). A customer's ability to challenge a subpoena is cabined by strict procedural requirements. For example, he must assert his claim within a short period of time, § 3410(a), and cannot appeal an adverse determination until the Government has completed its investigation, § 3410(d). Perhaps most importantly, the statute is drafted in a fashion that minimizes the risk that customers' objections to subpoenas will delay or frustrate agency investigations.

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Thus, a court presented with such a challenge is required to rule upon it within seven days of the Government's response, § 3410(b), and the pertinent statutes of limitations are tolled while the claim is pending, § 3419. Since 1980, the SEC has been subject to the constraints of the Right to Financial Privacy Act. Pub L 96-433, § 3, 94 Stat 1855, 15 USC § 78u(h)(1) [15 USCS § 78u(h)(1)]. When it made the statute applicable to the SEC, however, Congress empowered the Commission in prescribed circumstances to seek ex parte orders authorizing it to delay notifying bank customers when it subpoenas information about them, thereby further curtailing the ability of persons under investigation to impede the agency's inquiries. 15 USC § 78u(h)(2) [15 USCS § 78u(h)(2)].

Considerable insight into the legislators' conception of the scope of the SEC's investigatory power can be gleaned from the foregoing developments. We know that Congress recently had occasion to consider the authority of the SEC and other agencies to issue and enforce administrative subpoenas without notifying the persons whose affairs may be exposed thereby. In response, Congress enacted a set of carefully tailored limitations on the agencies' power, designed "to strike a balance between customers' right of privacy and the need of law enforcement agencies to obtain financial records pursuant to legitimate investigations." HR Rep No. 95-1383, p 33 (1978). The manner in which Congress dealt with this problem teaches us two things. First, it seems apparent that Congress assumed that the SEC was not and would not be subject to a general obligation to notify "targets" of its investigations whenever it issued administrative subpoenas.[16] Second, the complexity and subtlety of the

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procedures embodied in the Right to Financial Privacy Act suggests that Congress would find troubling the crude and unqualified notification requirement ordered by the Court of Appeals.[17]

16. In this regard, it is noteworthy that the pertinent congressional Committees expressed their desire that the judiciary not supplement the remedies created by the statute with any implied causes of action. See HR Rep No. 96-1321, pt 1, p 10 (1980); HR Rep No. 95-1383, pp 54, 56, 225, 230 (1978).

17. The significance of these two lessons is not that they illuminate Congress' intent when it enacted or when it subsequently amended the crucial provisions vesting the Commission with investigatory authority, see supra, at 743-744, 81 L Ed 2d, at 622-623 Rather, they inform our determination whether adoption of the remedy proposed by respondents would comport with or disrupt the system of statutes governing the issuance and trading of securities, as that system has been modified and refined by Congress in the years since 1933. In this regard, our inquiry is analogous to the kind of analysis contemplated by the third of the four factors we consider when deciding whether it would be appropriate to create a private right of action as an adjunct to a right created by statute: "[I]s it consistent with the underlying purposes of the legislative scheme to imply such a remedy . . . ?" See, e.g., Cannon v University of Chicago, 441 US 677, 688, n 9, 703–708, 60 L Ed 2d 560, 99 S Ct 1946 (1979); Cort v

C

The last of the three potential footings for the remedy sought by respondents is some other entitlement that would be effectuated thereby. Respondents seek to derive such an entitlement from a combination of our prior decisions. Distilled, their argument is as follows: A subpoena issued by the SEC must comport with the standards set forth in our decision in United States v Powell, 379 US, at 57–58, 13 L Ed 2d 112, 85 S Ct 248.[18] Not

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only the recipient of an SEC subpoena, but also any person who would be affected by compliance therewith, has a substantive right, under Powell, to insist that those standards are met. A target of an SEC investigation may assert the foregoing right in two ways. First, relying on Reisman v Caplin, 375 US 440, 445, 11 L Ed 2d 459, 84 S Ct 508 (1964), and Donaldson v United States, 400 US, at 529, 27 L Ed 2d 580, 91 S Ct 534,[19] the target may seek permissive intervention in an enforcement action brought by the Commission against the subpoena recipient. Second, if the recipient of the subpoena threatens voluntarily to turn over the requested information, the target "might restrain compliance" by the recipient, thereby forcing the Commission to institute an enforcement suit. See Reisman v Caplin, supra, at 450, 11 L Ed 2d 459, 84 S Ct 508. A target can avail himself of these options only if he is aware of the existence of subpoenas directed at others. To ensure that ignorance does not prevent a target from as-

Ash, 422 US 66, 78, 45 L Ed 2d 26, 95 S Ct 2080 (1975).

18. The holding of Powell was that the Commissioner of Internal Revenue need not demonstrate probable cause in order to secure judicial enforcement of a summons issued pursuant to § 7602 of the Internal Revenue Code. The Court then went on to sketch the requirements that the Commissioner would be obliged to satisfy:
"He must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to that purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed . . . . [A] court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." 379 US, at 57–58, 13 L Ed 2d 112, 85 S Ct 248 (footnote omitted).
See United States v LaSalle National Bank, 437 US 298, 313–314, 57 L Ed 2d 221, 98 S Ct 2357 (1978). Some lower courts have held or assumed that the SEC must satisfy these standards in order to obtain enforcement of its subpoenas. E.g., SEC v ESM Government Securities, Inc. 645 F2d 310, 313–314 (CA5 1981). But cf. In re EEOC, 709 F2d 392, 398, n 2 (CA5 1983). Respondents contend that the obligation of an agency to follow pertinent "administrative steps" means in this context that any subpoena issued under the auspices of the SEC must come within the purview of a Formal Order of Investigation, see n 1, supra. Because of the manner in which we dispose of this case, we have no occasion to pass upon respondents' characterization or application of our decision in Powell.

19. In Reisman, the Court indicated in dictum that "both parties summoned [under § 7602] and those affected by a disclosure may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims." 375 US, at 445, 11 L Ed 2d 459, 84 S Ct 508; see id., at 449, 11 L Ed 2d 459, 84 S Ct 508. Our decision in Donaldson made clear that the right of a third party to intervene in an enforcement action "is permissive only and is not mandatory," 400 US, at 529, 27 L Ed 2d 580, 91 S Ct 534, and that determination whether intervention should be granted in a particular case requires "[t]he usual process of balancing opposing equities," id., at 530, 27 L Ed 2d 580, 91 S Ct 534.

serting his

[467 US 749]

rights, respondents conclude, the Commission must notify him when it issues a subpoena to a third party.

There are several tenuous links in respondents' argument. Especially debatable are the proposition that a target has a substantive right to be investigated in a manner consistent with the Powell standards and the assertion that a target may obtain a restraining order preventing voluntary compliance by a third party with an administrative subpoena. Certainly we have never before expressly so held. For the present, however, we may assume, arguendo, that a target enjoys each of the substantive and procedural rights identified by respondents. Nevertheless, we conclude that it would be inappropriate to elaborate upon those entitlements by mandating notification of targets whenever the Commission issues subpoenas.

Two considerations underlie our decision on this issue. First, administration of the notice requirement advocated by respondents would be highly burdensome for both the Commission and the courts. The most obvious difficulty would involve identification of the persons and organizations that should be considered "targets" of investigations.[20] The SEC often undertakes investigations into suspicious securities transactions without any knowledge of which of the parties involved may have violated the law.[21] To notify all potential wrongdoers in such a situation of the issuance of each subpoena would be virtually impossible. The Commission would thus be obliged to determine the point at which enough evidence had been assembled to focus suspicion on a manageable

[467 US 750]

subset of the participants in the transaction, thereby lending them the status of "targets" and entitling them to notice of the outstanding subpoenas directed at others. The complexity of that task is apparent. Even in cases in which the Commission could identify with reasonable ease the principal targets of its inquiry, another problem would arise. In such circumstances, a person not considered a target by the Commission could contend that he deserved that status and therefore should be given notice of subpoenas issued to others. To assess a claim of this sort, a district court would be obliged to conduct some kind of hearing to determine the scope and thrust of the ongoing investigation.[22] Implementation of this new remedy would drain the resources of the judiciary as well as the Commission.[23]

20. Neither the pertinent statutes nor the Commission's regulations define the term "target," so either the Commission or the courts would be obliged at the outset to develop a working definition of the term.

21. So, for example, the Commission is sometimes called upon to investigate unusually active trading in the stock of a company during the period immediately preceding a tender offer for that stock. In such a case, the Commission may have no idea which (if any) of the thousands of purchasers had improper access to inside information.

22. Cf. 704 F2d 1065, 1069 (CA9 1983) (case below) ("The target's right could be asserted . . . by other appropriate district court proceedings").

23. This remedy would also have the effect of laying bare the state of the Commission's knowledge and intentions midway through investigations. For the reasons sketched below, such exposure could significantly hamper the Commission's efforts to police violations of the securities laws.

Second, the imposition of a notice requirement on the SEC would substantially increase the ability of persons who have something to hide to impede legitimate investigations by the Commission. A target given notice of every subpoena issued to third parties would be able to discourage the recipients from complying, and then further delay disclosure of damaging information by seeking intervention in all enforcement actions brought by the Commission. More seriously, the understanding of the progress of an SEC inquiry that would flow from knowledge of which persons had received subpoenas would enable an unscrupulous target to destroy or alter documents, intimidate witnesses, or transfer securities or funds so that they could not be reached by the Government.[24] Especially in the context of securities regulation,

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where speed in locating and halting violations of the law is so important, we would be loathe to place such potent weapons in the hands of persons with a desire to keep the Commission at bay.

We acknowledge that our ruling may have the effect in practice of preventing some persons under investigation by the SEC from asserting objections to subpoenas issued by the Commission to third parties for improper reasons. However, to accept respondents' proposal "would unwarrantedly cast doubt upon and stultify the [Commission's] every investigatory move." Donaldson v United States, 400 US, at 531, 27 L Ed 2d 580, 91 S Ct 534. Particularly in view of Congress' manifest disinclination to require the Commission to notify targets whenever it seeks information from others, see supra, at 746-747, 81 L Ed 2d 624, we refuse so to curb the Commission's exercise of its statutory power.[25]

III

[1b] Nothing in this opinion should be construed to imply that it would be improper for the SEC to inform a target that it has issued a subpoena to someone else. But, for the reasons indicated above, we decline to curtail the Commission's discretion to determine when such notice would be appropriate and when it would not. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

24. See PepsiCo. v SEC, 563 F Supp 828, 832 (SDNY 1983) (To impose a notification requirement on the SEC "would necessarily permit all targets—and presumably all potential targets—effectively to monitor the course and conduct of agency investigations. Experience and common sense should establish that such a power would be greatly abused . . ."); cf. NLRB v Robbins Tire & Rubber Co. 437 US 214, 239, 57 L Ed 2d 159, 98 S Ct 2311 (1978) (citing the risk that employers or unions would attempt to "coerce or intimidate employees and others who have given statements" as a reason for holding exempt from disclosure under the Freedom of Information Act statements made to the National Labor Relations Board).

25. Cf. United States v Arthur Young & Co. 465 US 805, 816, 79 L Ed 2d 826, 104 S Ct 1495 (1984) (" 'absent unambiguous directions from Congress,' " the summons power conferred on the Internal Revenue Service by statute should not be restricted by the courts) (quoting United States v Bisceglia, 420 US 141, 150, 43 L Ed 2d 88, 95 S Ct 915 (1975)).

[488 US 445]

FLORIDA, Petitioner

v

MICHAEL A. RILEY

488 US 445, 102 L Ed 2d 835, 109 S Ct 693, reh den (US) L Ed 2d 172, 109 S Ct 1659

[No. 87-764]

Argued October 3, 1988. Decided January 23, 1989.

Decision: Surveillance from helicopter, at altitude of 400 feet, of interior of residential backyard greenhouse held not to be "search" requiring warrant under Fourth Amendment.

SUMMARY

A county sheriff's office received an anonymous tip that marijuana was being grown on the accused's property. An investigating officer discovered that he could not see from the road the contents of a greenhouse located behind the accused's mobile home, but the officer, while circling twice over the accused's property in a helicopter at an altitude of 400 feet, was able to see with his naked eye what he thought was marijuana growing in the greenhouse, of which the roof and sides were partially open. After a search, pursuant to a warrant based on the officer's observations, revealed marijuana growing in the greenhouse, the accused was charged in a Florida state court with possession of marijuana. The trial court granted the accused's motion to suppress the evidence, and the Florida Court of Appeals, Second District, reversed, but certified to the Florida Supreme Court the question whether the helicopter surveillance constituted a "search" for which a warrant was required under the Federal Constitution's Fourth Amendment. The Florida Supreme Court (1) held that because the accused had a reasonable expectation that his activities inside the greenhouse would remain private and out of the view of aerial observers, the helicopter surveillance constitued a "search" under the Fourth Amendment, (2) quashed the decision of the Court of Appeals, and (3) ordered the trial court's suppression order reinstated (511 So 2d 282).

On certiorari, the United States Supreme Court reversed. Although unable to agree on an opinion, five members of the court agreed that because the accused did not have a reasonable expectation that the greenhouse was

Briefs of Counsel, p 1113, infra.

protected from observation from a helicopter, the helicopter surveillance did not constitute a "search" under the Fourth Amendment.

WHITE, J., announced the judgment of the court and, in an opinion joined by REHNQUIST, Ch. J., SCALIA, and KENNEDY, JJ., expressed the view that the accused could not reasonably have expected that his greenhouse was protected from public or official observation from a helicopter which was not violating the law or Federal Aviation Administration (FAA) regulations by flying over the greenhouse at an altitude of 400 feet, where (1) there was nothing in the record to suggest that helicopters flying at altitudes of 400 feet were sufficiently rare to lend substance to the accused's claim that he reasonably anticipated that his greenhouse would not be subject to observation from that altitude, and (2) there was no intimation that the helicopter interfered with the accused's normal use of the greenhouse or other parts of the curtilage.

O'CONNOR, J., concurring in the judgment, expressed the view that police observation of the greenhouse in the accused's curtilage from a helicopter passing at an altitude of 400 feet did not violate an expectation of privacy that society was prepared to recognize as reasonable, because there was reason to believe that there was considerable public use of airspace at altitudes of 400 feet and above, and because the accused introduced no evidence to the contrary before the Florida courts, but that (1) the plurality's approach rested the scope of Fourth Amendment protection too heavily on compliance with FAA regulations whose purpose was to promote air safety, not to protect against unreasonable searches and seizures, and (2) the relevant inquiry was not whether the helicopter was where it had a right to be under FAA regulations, but whether it was in the public airways at an altitude at which members of the public traveled with sufficient regularity that the accused's expectation of privacy from aerial observation was reasonable.

BRENNAN, J., joined by MARSHALL and STEVENS, JJ., dissenting, expressed the view that the helicopter surveillance of the greenhouse from an altitude of 400 feet was a "search" for which a warrant was required under the Fourth Amendment, because (1) public aerial observation from that altitude of the accused's curtilage was not so commonplace that the accused's expectation of privacy in his backyard could be considered unreasonable, and (2) in resolving an empirical issue as to the extent of public use of the airspace at that altitude, the state should carry the burden of proof which, in the case at bar, it failed to do.

BLACKMUN, J., dissenting, expressed the view that (1) since private helicopters rarely fly over curtilages at an altitude of 400 feet, the burden of proving contrary facts necessary to show that the accused lacked a reasonable expectation of privacy should be imposed on the prosecution, and the failure to carry this burden should compel a finding that a Fourth Amendment search occurred, and (2) since prior cases gave the parties little guidance on the burden of proof issue, the case should be remanded to allow the prosecution an opportunity to meet this burden.

FLORIDA v RILEY
(1989) 488 US 445, 102 L Ed 2d 835, 109 S Ct 693

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Search and Seizure § 2 — what constitutes search — helicopter surveillance — greenhouse

1a-1d. A law enforcement officer's naked-eye surveillance from a helicopter, at an altitude of 400 feet, of the interior of a greenhouse in a residential backyard, where the roof and sides of the greenhouse are partially open, and where the officer sees what he thinks is marijuana growing in the greenhouse, will be held not to constitute a "search" under the Federal Constitution's Fourth Amendment, since the resident of a mobile home behind which the greenhouse is located does not have a reasonable expectation that the greenhouse is protected from aerial observation from that altitude, where (1) four Justices are of the opinion that the resident could not reasonably have expected that his greenhouse was protected from public or official observation from a helicopter which was not violating

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68 Am Jur 2d, Searches and Seizures §§ 8, 20

7 Federal Procedural Forms, L Ed, Criminal Procedure §§ 20:611-20:614

8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Forms 241, 242, 250, 258

USCS, Constitution, Amendment 4

US L Ed Digest, Search and Seizure § 2

Index to Annotations, Aviation; Curtilage; Observation; Privacy; Search and Seizure; Surveillance

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

What is within "curtilage" of house or other building, so as to be within protection from unreasonable searches and seizures, under Federal Constitution's Fourth Amendment. 94 L Ed 2d 913.

Validity of seizure under Fourth Amendment "plain view" doctrine. 75 L Ed 2d 1018.

Aerial observation or surveillance as violative of Fourth Amendment guaranty against unreasonable search and seizure. 56 ALR Fed 772.

the law or Federal Aviation Administration (FAA) regulations by flying over the greenhouse at an altitude of 400 feet, where (a) there is nothing in the record to suggest that helicopters flying at 400 feet are sufficiently rare to lend substance to the resident's claim that he reasonably anticipated that his greenhouse would not be subject to observation from that altitude, and (b) there is no intimation that the helicopter interfered with the resident's normal use of the greenhouse or other parts of the curtilage; and (2) a fifth Justice is of the opinion that because there is reason to believe that there is considerable public use of airspace at altitudes of 400 feet and above, and because the resident introduced no evidence to the contrary before the lower courts, the resident's expectation that his curtilage was protected from naked-eye aerial observation from altitudes of 400 feet was not a reasonable one, but that (a) the scope of Fourth Amendment protection should not be rested heavily on compliance with FAA regulations whose purpose is to promote air safety rather than to protect against unreasonable searches and seizures, and (b) the relevant inquiry is not whether the helicopter was where it had a right to be under FAA regulations, but whether it was in the public airways at an altitude at which members of the public travel with sufficient regularity that the resident's expectation of privacy from aerial observation was reasonable. [Per White, J., Rehnquist, Ch. J., Scalia, Kennedy, and O'Connor, JJ. Dissenting: Brennan, Marshall, Stevens, Blackmun, JJ.]

Search and Seizure § 2 — what constitutes search — public exposure

2a, 2b. What a person knowingly exposes to the public is not a subject of protection under the search and seizure provisions of the Federal Constitution's Fourth Amendment. [Per White, J., Rehnquist, Ch. J., Scalia, Kennedy, O'Connor, Brennan, Marshall, and Stevens, JJ.]

Search and Seizure § 2 — what constitutes search — regulatory compliance

3a-3g. For purposes of determining whether a "search" has occurred under the Federal Constitution's Fourth Amendment, whether a person has a reasonable expectation of privacy from helicopter surveillance, at an altitude of 400 feet, of a greenhouse located on his curtilage does not depend upon the fact that the helicopter was flying at a lawful altitude under applicable Federal Aviation Administration regulations, but depends on the frequency of public flights at that altitude. [Per O'Connor, Brennan, Marshall, Stevens, and Blackmun, JJ.]

SYLLABUS BY REPORTER OF DECISIONS

A Florida county sheriff's office received an anonymous tip that marijuana was being grown on respondent's property. When an investigating officer discovered that he could not observe from ground level the contents of a greenhouse on the property—which was enclosed on two sides and obscured from view on the other, open sides by trees, shrubs, and respondent's nearby home—he circled twice over the property in a helicopter at the height of 400 feet and made naked-eye observations through openings in the greenhouse roof and its open

sides of what he concluded were marijuana plants. After a search pursuant to a warrant obtained on the basis of these observations revealed marijuana growing in the greenhouse, respondent was charged with possession of that substance under Florida law. The trial court granted his motion to suppress the evidence. Although reversing, the State Court of Appeals certified the case to the State Supreme Court on the question whether the helicopter surveillance from 400 feet constituted a "search" for which a warrant was required under the Fourth Amendment. Answering that question in the affirmative, the court quashed the Court of Appeals' decision and reinstated the trial court's suppression order.

Held: The judgment is reversed.

511 So 2d 282, reversed.

Justice White, joined by The Chief Justice, Justice Scalia, and Justice Kennedy, concluded that the Fourth Amendment does not require the police traveling in the public airways at an altitude of 400 feet to obtain a warrant in order to observe what is visible to the naked eye. California v Ciraolo, 476 US 207, 90 L Ed 2d 210, 106 S Ct 1809—which held that a naked-eye police inspection of the backyard of a house from a fixed-wing aircraft at 1,000 feet was not a "search"—is controlling. Thus, respondent could not reasonably have expected that the contents of his greenhouse were protected from public or official inspection from the air, since he left the greenhouse's sides and roof partially open. The fact that the inspection was made from a helicopter is irrelevant, since, as in the case of fixed-wing planes, private and commercial flight by helicopter is routine. Nor, on the facts of this case, does it make a difference for Fourth Amendment purposes that the helicopter was flying below 500 feet, the Federal Aviation Administration's lower limit upon the navigable airspace for fixed-wing craft. Since the FAA permits helicopters to fly below that limit, the helicopter here was not violating the law, and any member of the public or the police could legally have observed respondent's greenhouse from that altitude. Although an aerial inspection of a house's curtilage may not always pass muster under the Fourth Amendment simply because the aircraft is within the navigable airspace specified by law, there is nothing in the record here to suggest that helicopters flying at 400 feet are sufficiently rare that respondent could have reasonably anticipated that his greenhouse would not be observed from that altitude. Moreover, there is no evidence that the helicopter interfered with respondent's normal use of his greenhouse or other parts of the curtilage, that intimate details connected with the use of the home or curtilage were observed, or that there was undue noise, wind, dust, or threat of injury.

Justice O'Connor concluded that the plurality's approach rests the scope of Fourth Amendment protection too heavily on compliance with FAA regulations, which are intended to promote air safety and not to protect the right to be secure against unreasonable searches and seizures. Whether respondent had a reasonable expectation of privacy from aerial observation of his curtilage does not depend on whether the helicopter was where it had a right to be, but, rather, on whether it was in the public airways at an altitude at

which members of the public travel with sufficient regularity that respondent's expectation was not one that society is prepared to recognize as "reasonable." Because there is reason to believe that there is considerable public use of airspace at altitudes of 400 feet and above, and because respondent introduced no evidence to the contrary before the state courts, it must be concluded that his expectation of privacy here was not reasonable. However, public use of altitudes lower than 400 feet —particularly public observations from helicopters circling over the curtilage of a home—may be sufficiently rare that police surveillance from such altitudes would violate reasonable expectations of privacy, despite compliance with FAA regulations.

White, J., announced the judgment of the Court and delivered an opinion in which Rehnquist, C.J., and Scalia and Kennedy, JJ., joined. O'Connor, J., filed an opinion concurring in the judgment. Brennan, J., filed a dissenting opinion, in which Marshall and Stevens, JJ., joined. Blackmun, J., filed a dissenting opinion.

APPEARANCES OF COUNSEL

Parker D. Thomson argued the cause for petitioner.
Marc H. Salton argued the cause for respondent.
Briefs of Counsel, p 1113, infra.

SEPARATE OPINIONS

[488 US 447]

Justice **White** announced the judgment of the Court and delivered an opinion, in which The **Chief Justice,** Justice **Scalia,** and Justice **Kennedy** join.

[1a] On certification to it by a lower state court, the Florida Supreme Court addressed the following question: "Whether surveillance of the interior of a partially covered greenhouse

[488 US 448]

in a residential backyard from the vantage point of a helicopter located 400 feet above the greenhouse constitutes a 'search' for which a warrant is required under the Fourth Amendment and Article I, § 12 of the Florida Constitution." 511 So 2d 282 (1987). The court answered the question in the affirmative, and we granted the State's petition for certiorari challenging that conclusion. 484 US 1058, 98 L Ed 2d 977, 108 S Ct 1011 (1988).[1]

Respondent Riley lived in a mobile home located on five acres of rural property. A greenhouse was located 10 to 20 feet behind the mobile home. Two sides of the greenhouse were enclosed. The other two sides were not enclosed but the contents of the greenhouse were obscured from view from surrounding property by trees, shrubs, and the mobile home. The greenhouse was covered by corrugated roofing panels, some

1. The Florida Supreme Court mentioned the State Constitution in posing the question, once in the course of its opinion, and again in finally concluding that the search violated the Fourth Amendment and the State Constitution. The bulk of the discussion, however, focused exclusively on federal cases dealing with the Fourth Amendment, and there being no indication that the decision "clearly and expressly . . . is alternatively based on bona fide separate, adequate, and independent grounds," we have jurisdiction. Michigan v Long, 463 US 1032, 1041, 77 L Ed 2d 1201, 103 S Ct 3469 (1983).

translucent and some opaque. At the time relevant to this case, two of the panels, amounting to approximately 10% of the roof area, were missing. A wire fence surrounded the mobile home and the greenhouse, and the property was posted with a "DO NOT ENTER" sign.

This case originated with an anonymous tip to the Pasco County Sheriff's office that marijuana was being grown on respondent's property. When an investigating officer discovered that he could not see the contents of the greenhouse from the road, he circled twice over respondent's property in a helicopter at the height of 400 feet. With his naked eye, he was able to see through the openings in the roof and one or more of the open sides of the greenhouse and to identify what he thought was marijuana growing in the structure. A warrant

[488 US 449]

was obtained based on these observations, and the ensuing search revealed marijuana growing in the greenhouse. Respondent was charged with possession of marijuana under Florida law. The trial court granted his motion to suppress; the Florida Court of Appeals reversed but certified the case to the Florida Supreme Court, which quashed the decision of the Court of Appeals and reinstated the trial court's suppression order.

[2a] We agree with the State's submission that our decision in California v Ciraolo, 476 US 207, 90 L Ed 2d 210, 106 S Ct 1809 (1986), controls this case. There, acting on a tip, the police inspected the backyard of a particular house while flying in a fixed-wing aircraft at 1,000 feet. With the naked eye the officers saw what they concluded was marijuana growing in the yard. A search warrant was obtained on the strength of this airborne inspection, and marijuana plants were found. The trial court refused to suppress this evidence, but a state appellate court held that the inspection violated the Fourth and Fourteenth Amendments to the United States Constitution, and that the warrant was therefore invalid. We in turn reversed, holding that the inspection was not a search subject to the Fourth Amendment. We recognized that the yard was within the curtilage of the house, that a fence shielded the yard from observation from the street, and that the occupant had a subjective expectation of privacy. We held, however, that such an expectation was not reasonable and not one "that society is prepared to honor." Id., at 214, 90 L Ed 2d 210, 106 S Ct 1809. Our reasoning was that the home and its curtilage are not necessarily protected from inspection that involves no physical invasion. "'What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.'" Id., at 213, 90 L Ed 2d 210, 106 S Ct 1809, quoting Katz v United States, 389 US 347, 351, 19 L Ed 2d 576, 88 S Ct 507 (1967). As a general proposition, the police may see what may be seen "from a public vantage point where [they have] a right to be," 476 US, at 213, 90 L Ed 2d 210, 106 S Ct 1809. Thus the police, like the public, would have been free to inspect the backyard garden from

[488 US 450]

the street if their view had been unobstructed. They were likewise free to inspect the yard from the vantage point of an aircraft flying in the navigable airspace as this plane was. "In an age where private and commercial flight in the public airways is routine, it is unrea-

sonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet. The Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye." Id., at 215, 90 L Ed 2d 210, 106 S Ct 1809.

[1b] We arrive at the same conclusion in the present case. In this case, as in Ciraolo, the property surveyed was within the curtilage of respondent's home. Riley no doubt intended and expected that his greenhouse would not be open to public inspection, and the precautions he took protected against ground-level observation. Because the sides and roof of his greenhouse were left partially open, however, what was growing in the greenhouse was subject to viewing from the air. Under the holding in Ciraolo, Riley could not reasonably have expected the contents of his greenhouse to be immune from examination by an officer seated in a fixed-wing aircraft flying in navigable airspace at an altitude of 1,000 feet or, as the Florida Supreme Court seemed to recognize, at an altitude of 500 feet, the lower limit of the navigable airspace for such an aircraft. 511 So 2d, at 288. Here, the inspection was made from a helicopter, but as is the case with fixed-wing planes, "private and commercial flight [by helicopter] in the public airways is routine" in this country, Ciraolo, supra, at 215, 90 L Ed 2d 210, 106 S Ct 1809, and there is no indication that such flights are unheard of in Pasco County, Florida.[2] Riley could not reasonably

[488 US 451]

have expected that his greenhouse was protected from public or official observation from a helicopter had it been flying within the navigable airspace for fixed-wing aircraft.

Nor on the facts before us, does it make a difference for Fourth Amendment purposes that the helicopter was flying at 400 feet when the officer saw what was growing in the greenhouse through the partially open roof and sides of the structure. We would have a different case if flying at that altitude had been contrary to law or regulation. But helicopters are not bound by the lower limits of the navigable airspace allowed to other aircraft.[3] Any member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse. The police officer did no more. This is not to say that an inspection of the curtilage of a house from an aircraft will always pass

2. The first use of the helicopter by police was in New York in 1947, and today every State in the country uses helicopters in police work. As of 1980, there were 1,500 such aircraft used in police work. E. Brown, The Helicopter in Civil Operations 79 (1981). More than 10,000 helicopters, both public and private, are registered in the United States. Federal Aviation Administration, Census of US Civil Aircraft, Calendar Year 1987, p 12. See also 1988 Helicopter Annual 9. And there are an estimated 31,697 helicopter pilots. Federal Aviation Administration, Statistical Handbook of Aviation, Calendar Year 1986, p 147.

3. While Federal Aviation Administration (FAA) regulations permit fixed- wing aircraft to be operated at an altitude of 1,000 feet while flying over congested areas and at an altitude of 500 feet above the surface in other than congested areas, helicopters may be operated at less than the minimums for fixed-wing aircraft "if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the [FAA] Administrator." 14 CFR § 91.79 (1988).

muster under the Fourth Amendment simply because the plane is within the navigable airspace specified by law. But it is of obvious importance that the helicopter in this case was *not* violating the law, and there is nothing in the record or before us to suggest that helicopters flying at 400 feet are sufficiently rare in this country to lend substance to respondent's claim that he reasonably anticipated that his greenhouse would not be subject to

[488 US 452]

observation from that altitude. Neither is there any intimation here that the helicopter interfered with respondent's normal use of the greenhouse or of other parts of the curtilage. As far as this record reveals, no intimate details connected with the use of the home or curtilage were observed, and there was no undue noise, and no wind, dust, or threat of injury. In these circumstances, there was no violation of the Fourth Amendment.

The judgment of the Florida Supreme Court is accordingly reversed.

So ordered.

Justice **O'Connor,** concurring in the judgment.

[1c, 3a] I concur in the judgment reversing the Supreme Court of Florida because I agree that police observation of the greenhouse in Riley's curtilage from a helicopter passing at an altitude of 400 feet did not violate an expectation of privacy "that society is prepared to recognize as 'reasonable.' " Katz v United States, 389 US 347, 361, 19 L Ed 2d 576, 88 S Ct 507 (1967) (Harlan, J., concurring). I write separately, however, to clarify the standard I believe follows from California v Ciraolo, 476 US 207, 90 L Ed 2d 210, 106 S Ct 1809 (1986). In my view, the plurality's approach rests the scope of Fourth Amendment protection too heavily on compliance with FAA regulations whose purpose is to promote air safety, not to protect "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." US Const, Amdt 4.

Ciraolo involved observation of curtilage by officers flying in an airplane at an altitude of 1,000 feet. In evaluating whether this observation constituted a search for which a warrant was required, we acknowledged the importance of curtilage in Fourth Amendment doctrine: "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." 476 US, at 212-213, 90 L Ed 2d 210, 106 S Ct 1809. Although the curtilage is an area to which the private activities

[488 US 453]

of the home extend, all police observation of the curtilage is not necessarily barred by the Fourth Amendment. As we observed: "The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." Id., at 213, 90 L Ed 2d 210, 106 S Ct 1809. In Ciraolo, we likened observation from a plane traveling in "public navigable airspace" at 1,000 feet to observation by police "passing by a home on public thoroughfares." We held that "[i]n an age where private and commercial flight in the public airways is routine," it is unreasonable to expect the curtilage to be constitutionally protected from aerial obser-

vation with the naked eye from an altitude of 1,000 feet. Id., at 215, 90 L Ed 2d 210, 106 S Ct 1809.

[3b] Ciraolo's expectation of privacy was unreasonable not because the airplane was operating where it had a "right to be," but because public air travel at 1,000 feet is a sufficiently routine part of modern life that it is unreasonable for persons on the ground to expect that their curtilage will not be observed from the air at that altitude. Although "helicopters are not bound by the lower limits of the navigable airspace allowed to other aircraft," ante, at 451, 102 L Ed 2d, at 842, there is no reason to assume that compliance with FAA regulations alone determines " 'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.' " Ciraolo, supra, at 212, 90 L Ed 2d 210, 106 S Ct 1809 (quoting Oliver v United States, 466 US 170, 182-183, 80 L Ed 2d 214, 104 S Ct 1735 (1984)). Because the FAA has decided that helicopters can lawfully operate at virtually any altitude so long as they pose no safety hazard, it does not follow that the expectations of privacy "society is prepared to recognize as 'reasonable' " simply mirror the FAA's safety concerns.

Observations of curtilage from helicopters at very low altitudes are not perfectly analogous to ground-level observations from public roads or sidewalks. While in both cases the police may have a legal right to occupy the physical space from which their observations are made, the two situations

[488 US 454]

are not necessarily comparable in terms of whether expectations of privacy from such vantage points should be considered reasonable. Public roads, even those less traveled by, are clearly demarked public thoroughfares. Individuals who seek privacy can take precautions, tailored to the location of the road, to avoid disclosing private activities to those who pass by. They can build a tall fence, for example, and thus ensure private enjoyment of the curtilage without risking public observation from the road or sidewalk. If they do not take such precautions, they cannot reasonably expect privacy from public observation. In contrast, even individuals who have taken effective precautions to ensure against ground-level observations cannot block off all conceivable aerial views of their outdoor patios and yards without entirely giving up their enjoyment of those areas. To require individuals to completely cover and enclose their curtilage is to demand more than the "precautions customarily taken by those seeking privacy." Rakas v Illinois, 439 US 128, 152, 58 L Ed 2d 387, 99 S Ct 421 (1978) (Powell, J., concurring). The fact that a helicopter could conceivably observe the curtilage at virtually any altitude or angle, without violating FAA regulations, does not in itself mean that an individual has no reasonable expectation of privacy from such observation.

[3c] In determining whether Riley had a reasonable expectation of privacy from aerial observation, the relevant inquiry after Ciraolo is not whether the helicopter was where it had a right to be under FAA regulations. Rather, consistent with Katz, we must ask whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that Riley's expectation of privacy from aerial observation was not

"one that society is prepared to recognize as 'reasonable.' " Katz, supra, at 361, 19 L Ed 2d 576, 88 S Ct 507. Thus, in determining " 'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment,' " Ciraolo, supra, at 212, 90 L Ed 2d 210, 106 S Ct 1809 (quoting Oliver, supra, at 182-183, 80 L Ed 2d 214, 104 S Ct 1735), it is not conclusive to observe,

[488 US 455]

as the plurality does, that "[a]ny member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse." Ante, at 451, 102 L Ed 2d, at 842. Nor is it conclusive that police helicopters may often fly at 400 feet. If the public rarely, if ever, travels overhead at such altitudes, the observation cannot be said to be from a vantage point generally used by the public and Riley cannot be said to have "knowingly expose[d]" his greenhouse to public view. However, if the public can generally be expected to travel over residential backyards at an altitude of 400 feet, Riley cannot reasonably expect his curtilage to be free from such aerial observation.

In my view, the defendant must bear the burden of proving that his expectation of privacy was a reasonable one, and thus that a "search" within the meaning of the Fourth Amendment even took place. Cf. Jones v United States, 362 US 257, 261, 4 L Ed 2d 697, 80 S Ct 725, 78 ALR2d 233 (1960) ("Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy"); Nardone v United States, 308 US 338, 341, 84 L Ed 307, 60 S Ct 266 (1939).

[1d] Because there is reason to believe that there is considerable public use of airspace at altitudes of 400 feet and above, and because Riley introduced no evidence to the contrary before the Florida courts, I conclude that Riley's expectation that his curtilage was protected from naked-eye aerial observation from that altitude was not a reasonable one. However, public use of altitudes lower than that—particularly public observations from helicopters circling over the curtilage of a home—may be sufficiently rare that police surveillance from such altitudes would violate reasonable expectations of privacy, despite compliance with FAA air safety regulations.

[488 US 456]

Justice **Brennan,** with whom Justice **Marshall** and Justice **Stevens** join, dissenting.

The Court holds today that police officers need not obtain a warrant based on probable cause before circling in a helicopter 400 feet above a home in order to investigate what is taking place behind the walls of the curtilage. I cannot agree that the Fourth Amendment to the Constitution, which safeguards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," tolerates such an intrusion on privacy and personal security.

I

[3d] The opinion for a plurality of the Court reads almost as if Katz v United States, 389 US 347, 19 L Ed 2d 576, 88 S Ct 507 (1967), had

never been decided. Notwithstanding the disclaimers of its final paragraph, the opinion relies almost exclusively on the fact that the police officer conducted his surveillance from a vantage point where, under applicable Federal Aviation Administration regulations, he had a legal right to be. Katz teaches, however, that the relevant inquiry is whether the police surveillance "violated the privacy upon which [the defendant] justifiably relied," id., at 353, 19 L Ed 2d 576, 88 S Ct 507—or, as Justice Harlan put it, whether the police violated an "expectation of privacy . . . that society is prepared to recognize as 'reasonable.'" Id., at 361, 19 L Ed 2d 576, 88 S Ct 507 (concurring opinion). The result of that inquiry in any given case depends ultimately on the judgment "whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." Amsterdam, Perspectives on the Fourth Amendment, 58 Minn L Rev 349, 403 (1974); see also 1 W. LaFave, Search and Seizure § 2.1(d), pp 310-314 (2d ed 1987).

The plurality undertakes no inquiry into whether low-level helicopter surveillance by the police of activities in an enclosed

[488 US 457]

backyard is consistent with the "aims of a free and open society." Instead, it summarily concludes that Riley's expectation of privacy was unreasonable because "[a]ny member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse." Ante, at 451, 102 L Ed 2d, at 842. This observation is, in turn, based solely on the fact that the police helicopter was within the airspace within which such craft are allowed by federal safety regulations to fly.

[2b] I agree, of course, that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." Katz, supra, at 351, 19 L Ed 2d 576, 88 S Ct 507. But I cannot agree that one "knowingly exposes [an area] to the public" solely because a helicopter may legally fly above it. Under the plurality's exceedingly grudging Fourth Amendment theory, the expectation of privacy is defeated if a single member of the public could conceivably position herself to see into the area in question without doing anything illegal. It is defeated whatever the difficulty a person would have in so positioning herself, and however infrequently anyone would in fact do so. In taking this view the plurality ignores the very essence of Katz. The reason why there is no reasonable expectation of privacy in an area that is exposed to the public is that little diminution in "the amount of privacy and freedom remaining to citizens" will result from police surveillance of something that any passerby readily sees. To pretend, as the plurality opinion does, that the same is true when the police use a helicopter to peer over high fences is, at best, disingenuous. Notwithstanding the plurality's statistics about the number of helicopters registered in this country, can it seriously be questioned that Riley enjoyed virtually complete privacy in his backyard greenhouse, and that that privacy was invaded solely by police helicopter surveillance? Is

the theoretical possibility that any member of the public (with sufficient means) could also have hired a helicopter and looked over Riley's fence of any relevance at all in determining

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whether Riley suffered a serious loss of privacy and personal security through the police action?

In California v Ciraolo, 476 US 207, 90 L Ed 2d 210, 106 S Ct 1809 (1986), we held that whatever might be observed from the window of an airplane flying at 1,000 feet could be deemed unprotected by any reasonable expectation of privacy. That decision was based on the belief that airplane traffic at that altitude was sufficiently common that no expectation of privacy could inure in anything on the ground observable with the naked eye from so high. Indeed, we compared those airways to "public thoroughfares," and made the obvious point that police officers passing by a home on such thoroughfares were not required by the Fourth Amendment to "shield their eyes." Id., at 213, 90 L Ed 2d 210, 106 S Ct 1809. Seizing on a reference in Ciraolo to the fact that the police officer was in a position "where he ha[d] a right to be," ibid., today's plurality professes to find this case indistinguishable because FAA regulations do not impose a minimum altitude requirement on helicopter traffic; thus, the officer in this case too made his observations from a vantage point where he had a right to be.[1]

It is a curious notion that the reach of the Fourth Amendment can be so largely defined by administrative regulations issued for purposes of flight safety.[2] It is more curious still

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that the plurality relies to such an extent on the legality of the officer's act, when we have consistently refused to equate police violation of the law with infringement of the Fourth Amendment.[3] But the plural-

1. What the plurality now states as a firm rule of Fourth Amendment jurisprudence appeared in Ciraolo, 476 US, at 213, 90 L Ed 2d 210, 106 S Ct 1809, as a passing comment: "Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible. E.g., United States v Knotts, 460 US 276, 282 [75 L Ed 2d 55, 103 S Ct 1081] (1983)." This rule for determining the constitutionality of aerial surveillance thus derives ultimately from Knotts, a case in which the police officers' feet were firmly planted on the ground. What is remarkable is not that one case builds on another, of course, but rather that a principle based on terrestrial observation was applied to airborne surveillance without any consideration whether that made a difference.

2. The plurality's use of the FAA regulations as a means for determining whether Riley enjoyed a reasonable expectation of privacy produces an incredible result. Fixed-wing aircraft may not be operated below 500 feet (1,000 feet over congested areas), while helicopters may be operated below those levels. See ante, at 451, n 3, 102 L Ed 2d, at 842. Therefore, whether Riley's expectation of privacy is reasonable turns on whether the police officer at 400 feet above his curtilage is seated in an airplane or a helicopter. This cannot be the law.

3. In Oliver v United States, 466 US 170, 80 L Ed 2d 214, 104 S Ct 1735 (1984), for example, we held that police officers who trespassed upon posted and fenced private land did not violate the Fourth Amendment, despite the fact that their action was subject to criminal sanctions. We noted that the interests vindicated by the Fourth Amendment were not identical with those served by the common law of trespass. See id., at 183-184, 80 L Ed 2d 214, 104 S Ct 1735, and n 15; see also Hester v United States, 265 US 57, 68 L Ed 898, 44 S Ct 445 (1924) (trespass in "open fields" does not violate the Fourth Amendment). In Olmstead v United States, 277 US 438, 466-469, 72 L Ed 944, 48 S Ct 564, 66 ALR 376 (1928), the illegality under state law of a wiretap that yielded the disputed evi-

ity's willingness to end its inquiry when it finds that the officer was in a position he had a right to be in is misguided for an even more fundamental reason. Finding determinative the fact that the officer was where he had a right to be is, at bottom, an attempt to analogize surveillance from a helicopter to surveillance by a police officer standing on a public road and viewing evidence of crime through an open window or a gap in a fence. In such a situation, the occupant of the home may be said to lack any

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reasonable expectation of privacy in what can be seen from that road—even if, in fact, people rarely pass that way.

[3e] The police officer positioned 400 feet above Riley's backyard was not, however, standing on a public road. The vantage point he enjoyed was not one any citizen could readily share. His ability to see over Riley's fence depended on his use of a very expensive and sophisticated piece of machinery to which few ordinary citizens have access. In such circumstances it makes no more sense to rely on the legality of the officer's position in the skies than it would to judge the constitutionality of the wiretap in Katz by the legality of the officer's position outside the telephone booth. The simple inquiry whether the police officer had the legal right to be in the position from which he made his observations cannot suffice, for we cannot assume that Riley's curtilage was so open to the observations of passersby in the skies that he retained little privacy or personal security to be lost to police surveillance. The question before us must be not whether the police were where they had a right to be, but whether public observation of Riley's curtilage was so commonplace that Riley's expectation of privacy in his backyard could not be considered reasonable. To say that an invasion of Riley's privacy from the skies was not impossible is most emphatically not the same as saying that his expectation of privacy within his enclosed curtilage was not "one that society is prepared to recognize as 'reasonable.'" Katz, 389 US, at 361, 19 L Ed 2d 576, 88 S Ct 507 (Harlan, J., concurring).[4] While, as we held in Ciraolo, air traffic at elevations of 1,000 feet or more may be so common that whatever could be seen with the naked eye from that elevation is unprotected by the Fourth Amendment, it is a large step from there to say that the Amendment offers no protection against low-level helicopter surveillance of enclosed curtilage

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areas. To

dence was deemed irrelevant to its admissibility. And of course Katz v United States, 389 US 347, 19 L Ed 2d 576, 88 S Ct 507 (1967), which overruled Olmstead, made plain that the question whether or not the disputed evidence had been procured by means of a trespass was irrelevant. Recently, in Dow Chemical Co. v United States, 476 US 227, 239, n 6, 90 L Ed 2d 226, 106 S Ct 1819 (1986), we declined to consider trade-secret laws indicative of a reasonable expectation of privacy. Our precedent thus points not toward the position adopted by the plurality opinion, but rather toward the view on this matter expressed some years ago by the Oregon Court of Appeals: "We . . . find little attraction in the idea of using FAA regulations because they were not formulated for the purpose of defining the reasonableness of citizens' expectations of privacy. They were designed to promote air safety." State v Davis, 51 Ore App 827, 831, 627 P2d 492, 494 (1981).

4. Cf. California v Greenwood, 486 US 35, 54, 100 L Ed 2d 30, 108 S Ct 1625 (1988) (Brennan, J., dissenting) ("The mere *possibility* that unwelcome meddlers *might* open and rummage through the containers does not negate the expectation of privacy in their contents . . .").

take this step is error enough. That the plurality does so with little analysis beyond its determination that the police complied with FAA regulations is particularly unfortunate.

II

Equally disconcerting is the lack of any meaningful limit to the plurality's holding. It is worth reiterating that the FAA regulations the plurality relies on as establishing that the officer was where he had a right to be set no minimum flight altitude for helicopters. It is difficult, therefore, to see what, if any, helicopter surveillance would run afoul of the plurality's rule that there exists no reasonable expectation of privacy as long as the helicopter is where it has a right to be.

Only in its final paragraph does the plurality opinion suggest that there might be some limits to police helicopter surveillance beyond those imposed by FAA regulations:

> "Neither is there any intimation here that the helicopter interfered with respondent's normal use of the greenhouse or of other parts of the curtilage. As far as this record reveals, no intimate details connected with the use of the home or curtilage were observed, and there was no undue noise, and no wind, dust, or threat of injury. In these circumstances, there was no violation of the Fourth Amendment." Ante, at 452, 102 L Ed 2d, at 843.[5]

I will deal with the "intimate details" below. For the rest, one wonders what the plurality believes the purpose of the Fourth Amendment to be. If through noise, wind, dust, and threat of injury from helicopters the State "interfered with respondent's normal use of the greenhouse or of other parts

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of the curtilage," Riley might have a cause of action in inverse condemnation, but that is not what the Fourth Amendment is all about. Nowhere is this better stated than in Justice White's opinion for the Court in Camara v Municipal Court, 387 US 523, 528, 18 L Ed 2d 930, 87 S Ct 1727 (1967): "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." See also Marshall v Barlow's, Inc. 436 US 307, 312, 56 L Ed 2d 305, 98 S Ct 1816 (1978) (same); Schmerber v California, 384 US 757, 767, 16 L Ed 2d 908, 86 S Ct 1826 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State"); Wolf v Colorado, 338 US 25, 27, 93 L Ed 1782, 69 S Ct 1359 (1949) ("The security of one's privacy against arbitrary intrusion by the police . . . is at the core of the Fourth Amendment . . ."), overruled on other grounds, Mapp v Ohio, 367 US 643, 6 L Ed 2d 1081, 81 S Ct 1684, 16 Ohio Ops 2d 384, 86 Ohio L Abs 513, 84 ALR2d 933 (1961); Boyd v United States, 116 US 616, 630, 29 L Ed 746, 6 S Ct 524 (1886) ("It is not the

5. Without actually stating that it makes any difference, the plurality also notes that "there is nothing in the record or before us to suggest" that helicopter traffic at the 400-foot level is so rare as to justify Riley's expectation of privacy. Ante, at 451, 102 L Ed 2d, at 843. The absence of anything "in the record or before us" to suggest the opposite, however, seems not to give the plurality pause. It appears, therefore, that it is the FAA regulation rather than any empirical inquiry that is determinative.

breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security . . .").

If indeed the purpose of the restraints imposed by the Fourth Amendment is to "safeguard the privacy and security of individuals," then it is puzzling why it should be the helicopter's noise, wind, and dust that provides the measure of whether this constitutional safeguard has been infringed. Imagine a helicopter capable of hovering just above an enclosed courtyard or patio without generating any noise, wind, or dust at all—and, for good measure, without posing any threat of injury. Suppose the police employed this miraculous tool to discover not only what crops people were growing in their greenhouses, but also what books they were reading and who their dinner guests were. Suppose, finally, that the FAA regulations remained unchanged, so that the police were undeniably "where they had a right to be." Would today's

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plurality continue to assert that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" was not infringed by such surveillance? Yet that is the logical consequence of the plurality's rule that, so long as the police are where they have a right to be under air traffic regulations, the Fourth Amendment is offended only if the aerial surveillance interferes with the use of the backyard as a garden spot. Nor is there anything in the plurality's opinion to suggest that any different rule would apply were the police looking from their helicopter, not into the open curtilage, but through an open window into a room viewable only from the air.

III

Perhaps the most remarkable passage in the plurality opinion is its suggestion that the case might be a different one had any "intimate details connected with the use of the home or curtilage [been] observed." Ante, at 452, 102 L Ed 2d, at 843. What, one wonders, is meant by "intimate details"? If the police had observed Riley embracing his wife in the backyard greenhouse, would we then say that his reasonable expectation of privacy had been infringed? Where in the Fourth Amendment or in our cases is there any warrant for imposing a requirement that the activity observed must be "intimate" in order to be protected by the Constitution?

It is difficult to avoid the conclusion that the plurality has allowed its analysis of Riley's expectation of privacy to be colored by its distaste for the activity in which he was engaged. It is indeed easy to forget, especially in view of current concern over drug trafficking, that the scope of the Fourth Amendment's protection does not turn on whether the activity disclosed by a search is illegal or innocuous. But we dismiss this as a "drug case" only at the peril of our own liberties. Justice Frankfurter once noted that "[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very

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nice people," United States v Rabinowitz, 339 US 56, 69, 94 L Ed 653, 70 S Ct 430 (1950) (dissenting opinion), and nowhere is this observation more apt than in the area of the Fourth Amendment, whose words have nec-

essarily been given meaning largely through decisions suppressing evidence of criminal activity. The principle enunciated in this case determines what limits the Fourth Amendment imposes on aerial surveillance of any person, for any reason. If the Constitution does not protect Riley's marijuana garden against such surveillance, it is hard to see how it will forbid the government from aerial spying on the activities of a law-abiding citizen on her fully enclosed outdoor patio. As Professor Amsterdam has eloquently written: "The question is not whether you or I must draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain of surveillance if we do not." Amsterdam, 58 Minn L Rev, at 403.[6]

IV

[3f] I find little to disagree with in the concurring opinion of Justice O'Connor, apart from its closing paragraphs. A majority of the Court thus agrees that the fundamental inquiry is not whether the police were where they had a right to be under FAA regulations, but rather whether Riley's expectation of privacy was rendered illusory by the extent of

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public observation of his backyard from aerial traffic at 400 feet.

What separates me from Justice O'Connor is essentially an empirical matter concerning the extent of public use of the airspace at that altitude, together with the question of how to resolve that issue. I do not think the constitutional claim should fail simply because "there is reason to believe" that there is "considerable" public flying this close to earth or because Riley "introduced no evidence to the contrary before the Florida courts." Ante, at 455, 102 L Ed 2d, at 845 (O'Connor, J., concurring in judgment). I should think that this might be an apt occasion for the application of Professor Davis' distinction between "adjudicative" and "legislative" facts. See Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv L Rev 364, 402-410 (1942); see also Advisory Committee's Notes on Fed Rule Evid 201, 28 USC App, pp 683-684 [28 USCS Appx, Fed Rules of Evid, Notes following Rule 201]. If so, I think we could take judicial notice that, while there may be an occasional privately owned helicopter that flies over populated areas at an altitude of 400 feet, such flights are a rarity and are almost entirely limited to approaching or leaving airports or to reporting traffic congestion near major roadways. And, as the concurrence agrees, ante, at 455, 102 L Ed 2d, at 845, the extent of police surveillance traffic cannot serve as a bootstrap to demonstrate public use of the airspace.

If, however, we are to resolve the

6. See also United States v White, 401 US 745, 789-790, 28 L Ed 2d 453, 91 S Ct 1122 (1971) (Harlan, J., dissenting):
"By casting its 'risk analysis' solely in terms of the expectations and risks that 'wrongdoers' or 'one contemplating illegal activities' ought to bear, the plurality opinion, I think, misses the mark entirely. . . . The interest [protected by the Fourth Amendment] is the expectation of the ordinary citizen, who has never engaged in illegal conduct in his life, that he may carry on his private discourse freely, openly, and spontaneously . . . . Interposition of a warrant requirement is designed not to shield 'wrongdoers,' but to secure a measure of privacy and a sense of personal security throughout our society."

issue by considering whether the appropriate party carried its burden of proof, I again think that Riley must prevail. Because the State has greater access to information concerning customary flight patterns and because the coercive power of the State ought not be brought to bear in cases in which it is unclear whether the prosecution is a product of an unconstitutional, warrantless search, cf. Bumper v North Carolina, 391 US 543, 548, 20 L Ed 2d 797, 88 S Ct 1788, 46 Ohio Ops 2d 382 (1968) (prosecutor has burden of proving consent to search), the burden of proof properly rests with the State and

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not with the individual defendant. The State quite clearly has not carried this burden.[7]

V

The issue in this case is, ultimately, "how tightly the fourth amendment permits people to be driven back into the recesses of their lives by the risk of surveillance." Amsterdam, supra, at 402. The Court today approves warrantless helicopter surveillance from an altitude of 400 feet. While Justice O'Connor's opinion gives reason to hope that this altitude may constitute a lower limit, I find considerable cause for concern in the fact that a plurality of four Justices would remove virtually all constitutional barriers to police surveillance from the vantage point of helicopters. The Fourth Amendment demands that we temper our efforts to apprehend criminals with a concern for the impact on our fundamental liberties of the methods we use. I hope it will be a matter of concern to my colleagues that the police surveillance methods they would sanction were among those described forty years ago in George Orwell's dread vision of life in the 1980's:

> "The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said . . . . In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows." G. Orwell, Nineteen Eighty-Four 4 (1949).

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Who can read this passage without a shudder, and without the instinctive reaction that it depicts life in some country other than ours? I respectfully dissent.

Justice **Blackmun**, dissenting.

[3g] The question before the Court is whether the helicopter surveillance over Riley's property constituted a "search" within the meaning of the Fourth Amendment. Like Justice Brennan, Justice Marshall, Justice Stevens, and Justice O'Connor, I believe that answering this question depends upon whether Riley has a

7. The issue in Jones v United States, 362 US 257, 261, 4 L Ed 2d 697, 80 S Ct 725, 78 ALR2d 233 (1960), cited by Justice O'Connor, was whether the defendant had standing to raise a Fourth Amendment challenge. While I would agree that the burden of alleging and proving facts necessary to show standing could ordinarily be placed on the defendant, I fail to see how that determination has any relevance to the question of where the burden should lie on the merits of the Fourth Amendment claim.

"reasonable expectation of privacy" that no such surveillance would occur, and does not depend upon the fact that the helicopter was flying at a lawful altitude under FAA regulations. A majority of this Court thus agrees to at least this much.

The inquiry then becomes how to determine whether Riley's expectation was a reasonable one. Justice Brennan, the two Justices who have joined him, and Justice O'Connor all believe that the reasonableness of Riley's expectation depends, in large measure, on the frequency of nonpolice helicopter flights at an altitude of 400 feet. Again, I agree.

How is this factual issue to be decided? Justice Brennan suggests that we may resolve it ourselves without any evidence in the record on this point. I am wary of this approach. While I, too, suspect that for most American communities it is a rare event when nonpolice helicopters fly over one's curtilage at an altitude of 400 feet, I am not convinced that we should establish a per se rule for the entire Nation based on judicial suspicion alone. See Coffin, Judicial Balancing, 63 NYUL Rev 16, 37 (1988).

But we need not abandon our judicial intuition entirely. The opinions of both Justice Brennan and Justice O'Connor, by their use of "cf." citations, implicitly recognize that none of our prior decisions tells us who has the burden of proving whether Riley's expectation of privacy was reasonable. In the absence of precedent on the point, it is appropriate for us to take into account our estimation of the

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frequency of nonpolice helicopter flights. See 4 W. LaFave, Search and Seizure § 11.2(b), p 228 (2d ed 1987) (burdens of proof relevant to Fourth Amendment issues may be based on a judicial estimate of the probabilities involved). Thus, because I believe that private helicopters rarely fly over curtilages at an altitude of 400 feet, I would impose upon the prosecution the burden of proving contrary facts necessary to show that Riley lacked a reasonable expectation of privacy. Indeed, I would establish this burden of proof for any helicopter surveillance case in which the flight occurred below 1,000 feet—in other words, for any aerial surveillance case not governed by the Court's decision in California v Ciraolo, 476 US 207, 90 L Ed 2d 210, 106 S Ct 1809 (1986).

In this case, the prosecution did not meet this burden of proof, as Justice Brennan notes. This failure should compel a finding that a Fourth Amendment search occurred. But because our prior cases gave the parties little guidance on the burden of proof issue, I would remand this case to allow the prosecution an opportunity to meet this burden.

The order of this Court, however, is not to remand the case in this manner. Rather, because Justice O'Connor would impose the burden of proof on Riley and because she would not allow Riley an opportunity to meet this burden, she joins the plurality's view that no Fourth Amendment search occurred. The judgment of the Court, therefore, is to reverse outright on the Fourth Amendment issue. Accordingly, for the reasons set forth above, I respectfully dissent.

[466 US 170]

RAY E. OLIVER, Petitioner

v

UNITED STATES (No. 82-15)

MAINE, Petitioner

v

RICHARD THORNTON (No. 82-1273)

466 US 170, 80 L Ed 2d 214, 104 S Ct 1735

[Nos. 82-15 and 82-1273]

Argued November 9, 1983. Decided April 17, 1984.

Decision: Warrantless search of marijuana fields by police officers held permissible under open fields doctrine.

SUMMARY

These two consolidated cases presented the question whether the open fields doctrine permits police officers to enter and search marijuana fields without a warrant where the fields are secluded and contain no-trespassing signs. In the first case (No. 82-15) the United States District Court for the Western District of Kentucky suppressed evidence of the discovery of the marijuana fields on the ground that the defendant had a reasonable expectation that the fields would remain private. A panel of the United States Court of Appeals for the Sixth Circuit affirmed the suppression order (657 F2d 85). The United States Court of Appeals for the Sixth Circuit, sitting en banc, reversed, holding that the open fields doctrine permitted the search (686 F2d 356). In the second case (No. 82-1273), a Maine trial court granted the defendant's motion to suppress the fruits of the search, holding that the open fields doctrine did not apply. The Maine Supreme Judicial Court affirmed (453 A2d 489).

On certiorari, the United States Supreme Court affirmed in case No. 82-15, and reversed and remanded in case No. 82-1273. In an opinion by POWELL, J., joined by BURGER, Ch. J., and BLACKMUN, REHNQUIST, and

SUBJECT OF ANNOTATION

Beginning on page 860, infra

Supreme Court's development of "open fields doctrine" with respect to Fourth Amendment search and seizure protections

Briefs of Counsel, p 857, infra.

O'CONNOR, JJ., and joined in part (as to holding 1 below) by WHITE, J., it was held that (1) the special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects" is not extended to the open fields and (2) an individual may not legitimately demand privacy for activities conducted out-of-doors in fields, except in the area immediately surrounding the home. The court stated that an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers and that the government's intrusion upon an open field is not a "search" for Fourth Amendment purposes merely because the intrusion is a trespass at common law. The court further ruled that the open fields doctrine, which permits police officers to enter and search a field without a warrant, is consistent with the plain language of the Fourth Amendment and its historical purposes.

WHITE, J., concurring in part and in the judgment, expressed the view that there was no need for the court to deal with the expectation of privacy matter, since expectations of privacy cannot convert a field into a "house" or an "effect."

MARSHALL, J., joined by BRENNAN and STEVENS, JJ., dissented, expressing the view that private land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the state in which the land lies is protected by the Fourth Amendment's proscription of unreasonable searches and seizures.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Appeal and Error § 500 — Supreme Court jurisdiction — adequate state grounds

1a, 1b. A decision by a state's highest court holding a search invalid does not rest upon adequate and independent state-law grounds where the state court referred only to the Fourth Amendment of the Federal Constitution, where the prior state cases that the court cited also construed the Federal Constitution, and where the state court did not articulate an independent state ground with sufficient clarity; the United States Supreme Court there-

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68 Am Jur 2d, Searches and Seizures § 20

8 Federal Procedure, L Ed, Criminal Procedure §§ 22:155 et seq.

7 Federal Procedural Forms, L Ed, Criminal Procedure §§ 20:611 et seq.

22 Am Jur Pl & Pr Forms (Rev), Searches and Seizures, Forms 71 et seq.

5 Am Jur Trials 331, Excluding Illegally Obtained Evidence; 8 Am Jur Trials 573, Defense of Narcotics Cases

USCS, Constitution, 4th Amendment

US L Ed Digest, Search and Seizure § 8

L Ed Index to Annos, Criminal Law; Food and Drugs; Privacy; Search and Seizure

ALR Quick Index, Criminal Law; Drugs and Narcotics; Exclusion or Suppression of Evidence; Marijuana; Privacy; Search and Seizure

Federal Quick Index, Criminal Law; Drugs, Narcotics, and Poisons; Exclusion of Evidence; Privacy; Search and Seizure; Suppression of Evidence

Auto-Cite®: Any case citation herein can be checked for form, parallel references, later history and annotation references through the Auto-Cite computer research system.

ANNOTATION REFERENCES

Supreme Court's development of "open fields doctrine" with respect to Fourth Amendment search and seizure protections. 80 L Ed 2d 860.

Supreme Court's views as to the federal legal aspects of the rights of privacy. 43 L Ed 2d 871.

Search and seizure: Observation of objects in "plain view." 29 L Ed 2d 1067.

Admissibility of evidence obtained by illegal search and seizure. 6 L Ed 2d 1544.

fore has jurisdiction to review the state court decision.

Search and Seizure § 8 — Fourth Amendment — open fields

2a, 2b. The special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects" is not extended to the open fields; nor are the open fields "effects" within the meaning of the Fourth Amendment. (Marshall, Brennan, and Stevens, JJ., dissented from this holding.)

[See annotation p 860, infra]

Search and Seizure § 8 — Fourth Amendment — intrusion upon open fields

3. The government's intrusion upon open fields is not one of those "unreasonable searches" proscribed by the Fourth Amendment.

[See annotation p 860, infra]

Search and Seizure § 5 — reasonable expectation of privacy

4. The Fourth Amendment does not protect the merely subjective expectation of privacy, but only those expectations that society is prepared to recognize as reasonable.

Search and Seizure § 5 — infringement of privacy — factors

5. No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant; in assessing the degree to which a search infringes upon individual privacy, relevant factors are the intention of the framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion.

Search and Seizure § 8 — privacy — fields

6. An individual may not legitimately demand privacy for activities conducted out-of-doors in fields, except in the area immediately surrounding the home. (Marshall, Brennan, and Stevens, JJ., dissented from this holding.)

[See annotation p 860, infra]

Search and Seizure § 8 — public place — protections

7a, 7b. An individual who enters a place defined to be "public" for Fourth Amendment analysis does not lose all claims to privacy or personal security; the Fourth Amendment's protections against unreasonable arrest or unreasonable seizure of effects upon the person remain fully applicable.

Search and Seizure § 8 — open fields — legitimate expectation of privacy

8a, 8b. No expectation of privacy legitimately attaches to open fields; an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers. (Marshall, Brennan, and Stevens, JJ., dissented from this holding.)

[See annotation p 860, infra]

Search and Seizure § 8 — open fields — areas

9a, 9b. The term "open fields" for purposes of the Fourth Amendment may include any unoccupied or undeveloped area outside of the curtilage, and an open field need be neither "open" nor a "field" as those terms are used in common speech; a thickly wooded area may be an open field as that term is used in construing the Fourth Amendment.

[See annotation p 860, infra]

Search and Seizure § 8 — Fourth Amendment protection — curtilage

10a, 10b. Curtilage, the area around the home to which the activ-

ity of home life extends, is within the protection of the Fourth Amendment.

Search and Seizure § 5 — legitimate expectation of privacy — test

11. The test of whether an expectation of privacy is legitimate for Fourth Amendment purposes is not whether the individual chooses to conceal assertedly "private" activity; rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.

Search and Seizure § 8 — police inspection of open fields

12. A police inspection of open fields does not infringe a legitimate expectation of privacy for purposes of the Fourth Amendment.

[See annotation p 860, infra]

Search and Seizure §§ 2, 8 — intrusion upon open field — trespass

13a, 13b. The government's intrusion upon an open field is not a "search" for Fourth Amendment purposes merely because that intrusion is a trespass at common law; the law of trespass forbids intrusions upon land that the Fourth Amendment would not proscribe; in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment. (Marshall, Brennan, and Stevens, JJ., dissented from this holding.)

[See annotation p 860, infra]

Search and Seizure § 8 — legitimate expectation of privacy — property interest

14. Even a property interest in premises may not be sufficient to establish a legitimate expectation of privacy for Fourth Amendment purposes with respect to particular items located on the premises or activity conducted thereon.

Trespass § 1 — unlicensed use of property

15a, 15b. Unlicensed use of property by others is presumptively unjustified, as anyone who wishes to use the property is free to bargain for the right to do so with the property owner.

Search and Seizure § 5; Trespass § 1 — protection from intrusion — Fourth Amendment interests

16a, 16b. The law of trespass confers protections from intrusion by others far broader than those required by Fourth Amendment interests.

Search and Seizure § 8 — open fields doctrine — Fourth Amendment

17. The opens fields doctrine, which permits police officers to enter and search a field without a warrant, is consistent with the plain language of the Fourth Amendment and its historical purposes.

[See annotation p 860, infra]

SYLLABUS BY REPORTER OF DECISIONS

In No. 82-15, acting on reports that marihuana was being raised on petitioner's farm, narcotics agents of the Kentucky State Police went to the farm to investigate. Arriving at the farm, they drove past petitioner's house to a locked gate with a "No Trespassing" sign, but with a footpath around one side. The agents then walked around the gate and along the road and found a field of marihuana over a mile from peti-

tioner's house. Petitioner was arrested and indicted for "manufactur[ing]" a "controlled substance" in violation of a federal statute. After a pretrial hearing, the District Court suppressed evidence of the discovery of the marihuana field, applying Katz v United States, 389 US 347, 19 L Ed 2d 576, 88 S Ct 507, and holding that petitioner had a reasonable expectation that the field would remain private and that it was not an "open" field that invited casual intrusion. The Court of Appeals reversed, holding that Katz had not impaired the vitality of the open fields doctrine of Hester v United States, 265 US 57, 68 L Ed 898, 44 S Ct 445, which permits police officers to enter and search a field without a warrant. In No. 82-1273, after receiving a tip that marihuana was being grown in the woods behind respondent's residence, police officers entered the woods by a path between the residence and a neighboring house, and followed a path through the woods until they reached two marihuana patches fenced with chicken wire and having "No Trespassing" signs. Later, the officers, upon determining that the patches were on respondent's property, obtained a search warrant and seized the marihuana. Respondent was then arrested and indicted. The Maine trial court granted respondent's motion to suppress the fruits of the second search, holding that the initial warrantless search was unreasonable, that the "No Trespassing" signs and secluded location of the marihuana patches evinced a reasonable expectation of privacy, and that therefore the open fields doctrine did not apply. The Maine Supreme Judicial Court affirmed.

Held: The open fields doctrine should be applied in both cases to determine whether the discovery or seizure of the marihuana in question was valid.

(a) That doctrine was founded upon the explicit language of the Fourth Amendment, whose special protection accorded to "persons, houses, papers, and effects" does "not exten[d] to the open fields." Hester v United States, supra, at 59, 68 L Ed 898, 44 S Ct 445. Open fields are not "effects" within the meaning of the Amendment, the term "effects" being less inclusive than "property" and not encompassing open fields. The government's intrusion upon open fields is not one of those "unreasonable searches" proscribed by the Amendment.

(b) Since Katz v United States, supra, the touchstone of Fourth Amendment analysis has been whether a person has a "constitutionally protected reasonable expectation of privacy." Id., at 360, 19 L Ed 2d 576, 88 S Ct 507. The Amendment does not protect the merely subjective expectation of privacy, but only those "expectation[s] that society is prepared to recognize as 'reasonable.'" Id., at 361, 19 L Ed 2d 576, 88 S Ct 507. Because open fields are accessible to the public and the police in ways that a home, office, or commercial structure would not be, and because fences or "No Trespassing" signs do not effectively bar the public from viewing open fields, the asserted expectation of privacy in open fields is not one that society recognizes as reasonable. Moreover, the common law, by implying that only the land immediately surrounding and associated with the home warrants the Fourth Amendment protections that attach to the home, conversely implies that no expectation of privacy legitimately attaches to open fields.

(c) Analysis of the circumstances of the search of an open field on a case-by-case basis to determine whether reasonable expectations of privacy were violated would not provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment. Such an ad hoc approach not only would make it difficult for the policeman to discern the scope of his authority but also would create the danger that constitutional rights would be arbitrarily and inequitably enforced.

(d) Steps taken to protect privacy, such as planting the marihuana on secluded land and erecting fences and "No Trespassing" signs around the property, do not establish that expectations of privacy in an open field are *legitimate* in the sense required by the Fourth Amendment. The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity, but whether the government's intrusion infringes upon the personal and societal values protected by the Amendment. The fact that the government's intrusion upon an open field is a trespass at common law does not make it a "search" in the constitutional sense. In the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment.

686 F2d 356, affirmed; 453 A2d 489, reversed and remanded.

Powell, J., delivered the opinion of the Court, in which Burger, C.J., and Blackmun, Rehnquist, and O'Connor, JJ., joined, and in Parts I and II of which White, J., joined. White, J., filed an opinion concurring in part and concurring in the judgment. Marshall, J., filed a dissenting opinion, in which Brennan and Stevens, JJ., joined.

APPEARANCES OF COUNSEL

Frank E. Haddad, Jr. argued the cause for petitioner in 82–15.
Alan I. Horowitz argued the cause for respondent in 82–15.
Wayne S. Moss argued the cause for petitioner in 82–1273.
Donna L. Zeegers argued the cause for respondent in 82–1273.
Briefs of Counsel, p 857, infra.

OPINION OF THE COURT

[466 US 173]

Justice **Powell** delivered the opinion of the Court.

The "open fields" doctrine, first enunciated by this Court in Hester v United States, 265 US 57, 68 L Ed 898, 44 S Ct 445 (1924), permits police officers to enter and search a field without a warrant. We granted certiorari in these cases to clarify confusion that has arisen as to the continued vitality of the doctrine.

I

No. 82–15. Acting on reports that marihuana was being raised on the farm of petitioner Oliver, two narcotics agents of the Kentucky State Police went to the farm to investigate.[1] Arriving at the farm, they

1. It is conceded that the police did not have a warrant authorizing the search,, that there was no probable cause for the search, and that no exception to the warrant requirement is applicable.

drove past petitioner's house to a locked gate with a "No Trespassing" sign. A footpath led around one side of the gate. The agents walked around the gate and along the road for several hundred yards, passing a barn and a parked camper. At that point, someone standing in front of the camper shouted: "No hunting is allowed, come back up here." The officers shouted back that they were Kentucky State Police officers, but found no one when they returned to the camper. The officers resumed their investigation of the farm and found a field of marihuana over a mile from petitioner's home.

Petitioner was arrested and indicted for "manufactur[ing]" a "controlled substance." 21 USC § 841(a)(1) [21 USCS § 841(a)(1)]. After a pretrial hearing, the District Court suppressed evidence of the discovery of the marihuana field. Applying Katz v United States, 389 US 347, 357, 19 L Ed 2d 576, 88 S Ct 507 (1967), the court found that petitioner had a reasonable expectation that the field would remain private because petitioner "had done all that could be expected of him to assert his privacy in the area of farm that was searched." He had posted "No Trespassing" signs at regular intervals and had locked the gate at the entrance to the center of the farm. App to Pet for Cert in No. 82-15,

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pp 23–24. Further, the court noted that the field itself is highly secluded: it is bounded on all sides by woods, fences, and embankments and cannot be seen from any point of public access. The court concluded that this was not an "open" field that invited casual intrusion.

The Court of Appeals for the Sixth Circuit, sitting en banc, reversed the District Court. 686 F2d 356 (1982).[2] The court concluded that Katz, upon which the District Court relied, had not impaired the vitality of the open fields doctrine of Hester. Rather, the open fields doctrine was entirely compatible with Katz' emphasis on privacy. The court reasoned that the "human relations that create the need for privacy do not ordinarily take place" in open fields, and that the property owner's common-law right to exclude trespassers is insufficiently linked to privacy to warrant the Fourth Amendment's protection. 686 F2d, at 360.[3] We granted certiorari. 459 US 1168, 74 L Ed 2d 1012, 103 S Ct 812 (1983).

No. 82–1273. After receiving an anonymous tip that marihuana was being grown in the woods behind respondent Thornton's residence, two police officers entered the woods by a path between this residence and a neighboring house. They followed a footpath through the woods until they reached two marihuana patches fenced with chicken wire. Later, the officers determined that the patches were on the property of respondent, obtained a warrant to search the property, and seized the marihuana. On the basis of this evi-

2. A panel of the Sixth Circuit had affirmed the suppression order. 657 F2d 85 (1981).

3. The four dissenting judges contended that the open fields doctrine did not apply where, as in this case, "reasonable effort[s] [have] been made to exclude the public." 686 F2d, at 372. To that extent, the dissent considered that Katz v United States implicitly had overruled previous holdings of this Court. The dissent then concluded that petitioner had established a "reasonable expectation of privacy" under the Katz standard. Judge Lively also wrote separately to argue that the open fields doctrine applied only to lands that could be viewed by the public.

dence, respondent was arrested and indicted.

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The trial court granted respondent's motion to suppress the fruits of the second search. The warrant for this search was premised on information that the police had obtained during their previous warrantless search, that the court found to be unreasonable.[4] "No Trespassing" signs and the secluded location of the marihuana patches evinced a reasonable expectation of privacy. Therefore, the court held, the open fields doctrine did not apply.

[1a] The Maine Supreme Judicial Court affirmed. 453 A2d 489 (1982). It agreed with the trial court that the correct question was whether the search "is a violation of privacy on which the individual justifiably relied," id., at 493, and that the search violated respondent's privacy. The court also agreed that the open fields doctrine did not justify the search. That doctrine applies, according to the court, only when officers are lawfully present on property and observe "open and patent" activity. Id., at 495. In this case, the officers had trespassed upon defendant's property, and the respondent had made every effort to conceal his activity. We granted certiorari. 460 US 1068, 75 L Ed 2d 944, 103 S Ct 1520 (1983).[5]

[466 US 176]

II

[2a] The rule announced in Hester v United States was founded upon the explicit language of the Fourth Amendment. That Amendment indicates with some precision the places and things encompassed by its protections. As Justice Holmes explained for the Court in his characteristically laconic style: "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law." Hester v United States, 265 US, at 59, 68 L Ed 898, 44 S Ct 445.[6]

4. The court also discredited other information, supplied by a confidential informant, upon which the police had based their warrant application.

5. [1b] Respondent contends that the decision below rests upon adequate and independent state-law grounds. We do not read that decision, however, as excluding the evidence because the search violated the State Constitution. The Maine Supreme Judicial Court referred only to the Fourth Amendment oF the Federal Constitution and purported to apply the Katz test; the prior state cases that the court cited also construed the Federal Constitution. In any case, the Maine Supreme Judicial Court did not articulate an independent state ground with the clarity required by Michigan v Long, 463 US 1032, 77 L Ed 2d 1201, 103 S Ct 3469 (1983).

Contrary to respondent's assertion, we do not review here the state courts' finding as a matter of "fact" that the area searched was not an "open field." Rather, the question before us is the appropriate legal standard for determining whether search of that area without a warrant was lawful under the Federal Constitution.

The conflict between the two cases that we review here is illustrative of the confusion the open fields doctrine has generated among the state and federal courts. Compare, e.g., State v Byers, 359 So 2d 84 (La 1978) (refusing to apply open fields doctrine); State v Brady, 406 So 2d 1093 (Fla 1981) (same), with United States v Lace, 669 F2d 46, 50–51 (CA2 1982); United States v Freie, 545 F2d 1217 (CA9 1976); United States v Brown, 473 F2d 952, 954 (CA5 1973); Atwell v United States, 414 F2d 136, 138 (CA5 1969).

6. The dissent offers no basis for its suggestion that Hester rests upon some narrow, unarticulated principle rather than upon the reasoning enunciated by the Court's opinion in that case. Nor have subsequent cases discredited Hester's reasoning. This Court frequently has relied on the explicit language of the Fourth Amendment as delineating the scope of its affirmative protections. See, e.g.,

[2b, 3] Nor are the open fields "effects" within the meaning of the Fourth

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Amendment. In this respect, it is suggestive that James Madison's proposed draft of what became the Fourth Amendment preserves "[t]he rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures . . . ." See N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 100, n 77 (1937). Although Congress' revisions of Madison's proposal broadened the scope of the Amendment in some respects, id., at 100–103, the term "effects" is less inclusive than "property" and cannot be said to encompass open fields.[7] We conclude, as did the Court in deciding Hester v United States, that the government's intrusion upon the open fields is not one of those "unreasonable searches" proscribed by the text of the Fourth Amendment.

III

[4] This interpretation of the Fourth Amendment's language is consistent with the understanding of the right to privacy expressed in our Fourth Amendment jurisprudence. Since Katz v United States, 389 US 347, 19 L Ed 2d 576, 88 S Ct 507 (1967), the touchstone of Amendment analysis has been the question whether a person has a "constitutionally protected reasonable expectation of privacy." Id., at 360, 19 L Ed 2d 576, 88 S Ct 507 (Harlan, J., concurring). The Amendment does not protect the merely subjective expectation of privacy, but only those "expectation[s] that society is prepared to recognize as 'reasonable.'" Id., at 361, 19 L Ed 2d 576, 88 S Ct 507. See also Smith v Maryland, 442 US 735, 740–741, 61 L Ed 2d 220, 99 S Ct 2577 (1979).

A

[5] No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant. See Rakas v Illinois, 439 US 128, 152–153, 58 L Ed 2d 387, 99 S Ct 421

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(1978) (Powell, J., concurring). In assessing the degree to

Robbins v California, 453 US 420, 426, 69 L Ed 2d 744, 101 S Ct 2841 (1981) (opinion of Stewart, J.); Payton v New York, 445 US, 573, 589–590, 63 L Ed 2d 639, 100 S Ct 1371 (1980); Alderman v United States, 394 US 165, 178–180, 22 L Ed 2d 176, 89 S Ct 961 (1969). As these cases, decided after Katz, indicate, Katz' "reasonable expectation of privacy" standard did not sever Fourth Amendment doctrine from the Amendment's language. Katz itself construed the Amendment's protection of the person against unreasonable searches to encompass electronic eavesdropping of telephone conversations sought to be kept private; and Katz' fundamental recognition that "the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures," see 389 US, at 353, 19 L Ed 2d 576, 88 S Ct 507, is faithful to the Amendment's language. As Katz demonstrates, the Court fairly may respect the constraints of the Constitution's language without wedding itself to an unreasoning literalism. In contrast, the dissent's approach would ignore the language of the Constitution itself as well as overturn this Court's governing precedent.

7. The Framers would have understood the term "effects" to be limited to personal, rather than real, property. See generally Doe v Dring, 2 M & S 448, 454, 105 Eng Rep 447, 449 (KB 1814) (discussing prior cases); 2 W. Blackstone, Commentaries *16, *384–*385.

which a search infringes upon individual privacy, the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, e.g., United States v Chadwick, 433 US 1, 7–8, 53 L Ed 2d 538, 97 S Ct 2476 (1977), the uses to which the individual has put a location, e.g., Jones v United States, 362 US 257, 265, 4 L Ed 2d 697, 80 S Ct 725, 78 ALR2d 233 (1960), and our societal understanding that certain areas deserve the most scrupulous protection from government invasion, e.g., Payton v New York, 445 US 573, 63 L Ed 2d 639, 100 S Ct 1371 (1980). These factors are equally relevant to determining whether the government's intrusion upon open fields without a warrant or probable cause violates reasonable expectations of privacy and is therefore a search proscribed by the Amendment.

[6] In this light, the rule of Hester v United States, supra, that we reaffirm today, may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. See also Air Pollution Variance Bd. v Western Alfalfa Corp., 416 US 861, 865, 40 L Ed 2d 607, 94 S Ct 2114 (1974). This rule is true to the conception of the right to privacy embodied in the Fourth Amendment. The Amendment reflects the recognition of the Founders that certain enclaves should be free from arbitrary government interference. For example, the Court since the enactment of the Fourth Amendment has stressed "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." Payton v New York, supra, at 601, 63 L Ed 2d 639, 100 S Ct 1371.[8] See also Silverman v United States, 365 US 505, 511, 5 L Ed 2d 734, 81 S Ct 679, 97 ALR2d 1277 (1961); United States v United States District Court, 407 US 297, 313, 32 L Ed 2d 752, 92 S Ct 2125 (1972).

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[7a] In contrast, open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or "No Trespassing" signs effectively bar the public from viewing open fields in rural areas. And both petitioner Oliver and respondent Thornton concede that the public and police lawfully may survey lands from the air.[9] For these reasons, the asserted expectation of

8. The Fourth Amendment's protection of offices and commercial buildings, in which there may be legitimate expectations of privacy, is also based upon societal expectations that have deep roots in the history of the Amendment. See Marshall v Barlow's, Inc., 436 US 307, 311, 56 L Ed 2d 305, 98 S Ct 1816 (1978); G. M. Leasing Corp. v United States, 429 US 338, 355, 50 L Ed 2d 530, 97 S Ct 619 (1977).

9. Tr of Oral Arg 14–15, 58. See, e.g., United States v Allen, 675 F2d 1373, 1380–1381 (CA9 1980); United States v DeBacker, 493 F Supp 1078, 1081 (WD Mich 1980). In practical terms, petitioner Oliver's and respondent Thornton's analysis merely would require law enforcement officers, in most situations, to use aerial surveillance to gather the information necessary to obtain a warrant or to justify warrantless entry onto the property. It is not easy to see how such a requirement would advance legitimate privacy interests.

privacy in open fields is not an expectation that "society recognizes as reasonable."[10]

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[8a, 9a] The historical underpinnings of the open fields doctrine also demonstrate that the doctrine is consistent with respect for "reasonable expectations of privacy." As Justice Holmes, writing for the Court, observed in Hester, 265 US, at 59, 68 L Ed 898, 44 S Ct 445, the common law distinguished "open fields" from the "curtilage," the land immediately surrounding and associated with the home. See 4 W. Blackstone, Commentaries *225. The distinction implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home. At common law, the curtilage is the area to which extends the intimate activity associated with the "sanctity of a man's home and the privacies of life," Boyd v United States, 116 US 616, 630, 29 L Ed 746, 6 S Ct 524 (1886), and therefore has been considered part of the home itself for Fourth Amendment purposes. Thus, courts have extended Fourth Amendment protection to the curtilage; and they have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private. See, e.g., United States v Van Dyke, 643 F2d 992, 993–994 (CA4 1981); United States v Williams, 581 F2d 451, 453 (CA5 1978); Care v United States, 231 F2d 22, 25 (CA10), cert denied, 351 US 932, 100 L Ed 1461, 76 S Ct 788 (1956). Conversely, the common law implies, as we reaffirm today, that no expectation of privacy legitimately attaches to open fields.[11]

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[8b] We conclude, from the text of the Fourth Amendment and from the historical and contemporary understanding of its purposes, that an

10. **[7b]** The dissent conceives of open fields as bustling with private activity as diverse as lovers' trysts and worship services. Post, at 191-193, 80 L Ed 2d, at 232–233. But in most instances police will disturb no one when they enter upon open fields. These fields, by their very character as open and unoccupied, are unlikely to provide the setting for activities whose privacy is sought to be protected by the Fourth Amendment. One need think only of the vast expanse of some western ranches or of the undeveloped woods of the Northwest to see the unreality of the dissent's conception. Further, the Fourth Amendment provides ample protection to activities in the open fields that might implicate an individual's privacy. An individual who enters a place defined to be "public" for Fourth Amendment analysis does not lose all claims to privacy or personal security. Cf. Arkansas v Sanders, 442 US 753, 766–767, 61 L Ed 2d 235, 99 S Ct 2586 (1979) (Burger, C.J., concurring in judgment). For example, the Fourth Amendment's protections against unreasonable arrest or unreasonable seizure of effects upon the person remain fully applicable. See, e.g., United States v Watson, 423 US 411, 46 L Ed 2d 598, 96 S Ct 820 (1976).

11. **[9b]** Neither petitioner Oliver nor respondent Thornton has contended that the property searched was within the curtilage. Nor is it necessary in these cases to consider the scope of the curtilage exception to the open fields doctrine or the degree of Fourth Amendment protection afforded the curtilage, as opposed to the home itself. It is clear, however, that the term "open fields" may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither "open" nor a "field" as those terms are used in common speech. For example, contrary to respondent Thornton's suggestion, Tr of Oral Arg 21–22, a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment. See, e.g., United States v Pruitt, 464 F2d 494 (CA9 1972); Bedell v State, 257 Ark 895, 521 SW2d 200 (1975).

individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers.

B

Petitioner Oliver and respondent Thornton contend, to the contrary, that the circumstances of a search sometimes may indicate that reasonable expectations of privacy were violated; and that courts therefore should analyze these circumstances on a case-by-case basis. The language of the Fourth Amendment itself answers their contention.

[10a] Nor would a case-by-case approach provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment. Under this approach, police officers would have to guess before every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded to establish a right of privacy. The lawfulness of a search would turn on "'[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions . . . .'" New York v Belton, 453 US 454, 458, 69 L Ed 2d 768, 101 S Ct 2860 (1981) (quoting LaFave, "Case-By-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma, 1974 S Ct Rev 127, 142). This Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances. See Belton, supra, at 458–460, 69 L Ed 2d 768, 101 S Ct 2860; Robbins v California, 453 US 420, 430, 69 L Ed 2d 744, 101 S Ct 2841 (1981) (Powell, J., concurring in judgement); Dunaway v New York, 442 US 200, 213–214, 60 L Ed 2d 824, 99 S Ct 2248 (1979); United States v Robinson, 414 US 218, 235, 38 L Ed 2d 427, 94 S Ct 467, 66 Ohio Ops 2d 202 (1973). The ad hoc approach not only makes it difficult for the policeman to discern the scope of his authority, Belton, supra, at 460, 69 L Ed 2d 768, 101 S Ct 2860; it also creates a danger that constitutional

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rights will be arbitrarily and inequitably enforced. Cf. Smith v Goguen, 415 US 566, 572–573, 39 L Ed 2d 605, 94 S Ct 1242 (1974).[12]

IV

[11, 12] In any event, while the factors that petitioner Oliver and respondent Thornton urge the courts to consider may be relevant to Fourth Amendment analysis in some contexts, these factors cannot be decisive on the question whether the search of an open field is subject to the Amendment. Initially, we reject the suggestion that steps taken to

12. **[10b]** The clarity of the open fields doctrine that we reaffirm today is not sacrificed, as the dissent suggests, by our recognition that the curtilage remains within the protections of the Fourth Amendment. Most of the many millions of acres that are "open fields" are not close to any structure and so not arguably within the curtilage. And, for most homes, the boundaries of the curtilage will be clearly marked; and the conception defining the curtilage—as the area around the home to which the activity of home life extends—is a familiar one easily understood from our daily experience. The occasional difficulties that courts might have in applying this, like other, legal concepts, do not argue for the unprecedented expansion of the Fourth Amendment advocated by the dissent.

protect privacy establish that expectations of privacy in an open field are legitimate. It is true, of course, that petitioner Oliver and respondent Thornton, in order to conceal their criminal activities, planted the marihuana upon secluded land and erected fences and "No Trespassing" signs around the property. And it may be that because of such precautions, few members of the public stumbled upon the marihuana crops seized by the police. Neither of these suppositions demonstrates, however, that the expectation of privacy was *legitimate* in the sense required by the Fourth Amendment. The test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity.[13] Rather, the correct inquiry is whether the government's intrusion infringes upon the personal

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and societal values protected by the Fourth Amendment. As we have explained, we find no basis for concluding that a police inspection of open fields accomplishes such an infringement.

[13a, 14] Nor is the government's intrusion upon an open field a "search" in the constitutional sense because that intrusion is a trespass at common law. The existence of a property right is but one element in determining whether expectations of privacy are legitimate. " 'The premise that property interests control the right of the Government to search and seize has been discredited.' " Katz, 389 US, at 353, 19 L Ed 2d 576, 88 S Ct 507 (quoting Warden v Hayden, 387 US 294, 304, 18 L Ed 2d 782, 87 S Ct 1642 (1967)). "[E]ven a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon." Rakas v Illinois, 439 US, at 144, n 12, 58 L Ed 2d 387, 99 S Ct 421.

[13b, 15a, 16a] The common law may guide consideration of what areas are protected by the Fourth Amendment by defining areas whose invasion by others is wrongful. Id., at 153, 58 L Ed 2d 387, 99 S Ct 421 (Powell, J., concurring).[14] The law of trespass, however, forbids intrusions upon land that the Fourth Amendment would not proscribe. For trespass law extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interest.[15] Thus, in the

13. Certainly the Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post "No Trespassing" signs.

14. As noted above, the common-law conception of the "curtilage" has served this function.

15. **[15b, 16b]** The law of trespass recognizes the interest in possession and control of one's property and for that reason permits exclusion of unwanted intruders. But it does not follow that the right to exclude conferred by trespass law embodies a privacy interest also protected by the Fourth Amendment. To the contrary, the common law of trespass furthers a range of interests that have nothing to do with privacy and that would not be served by applying the strictures of trespass law to public officers. Criminal laws against trespass are prophylactic: they protect against intruders who poach, steal livestock and crops, or vandalize property. And the civil action of trespass serves the important function of authorizing an owner to defeat claims of prescription by asserting his own title. See, e.g., O. Holmes, The Common Law 90–100, 244–246 (1881). In any event, unlicensed use of property by others is presumptively unjustified, as anyone who wishes to use the property is free to bargain for the right to do so with the property owner, cf. R. Posner, Economic Analysis of Law 10–13, 21 (1973). For

case of open fields, the general
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rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment.

V

[17] We conclude that the open fields doctrine, as enunciated in Hester, is consistent with the plain language of the Fourth Amendment and its historical purposes. Moreover, Justice Holmes' interpretation of the Amendment in Hester accords with the "reasonable expectation of privacy" analysis developed in subsequent decisions of this Court. We therefore affirm Oliver v United States; Maine v Thornton is reversed and remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SEPARATE OPINIONS

Justice **White,** concurring in part and concurring in the judgment.

I concur in the judgment and join Parts I and II of the Court's opinion. These Parts dispose of the issue before us; there is no need to go further and deal with the expectation of privacy matter. However reasonable a landowner's expectations of privacy may be, those expectations cannot convert a field into a "house" or an "effect."

Justice **Marshall,** with whom Justice **Brennan** and Justice **Stevens** join, dissenting.

In each of these consolidated cases, police officers, ignoring clearly visible "No Trespassing" signs, entered upon private land in search of evidence of a crime. At a spot that could
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not be seen from any vantage point accessible to the public, the police discovered contraband, which was subsequently used to incriminate the owner of the land. In neither case did the police have a warrant authorizing their activities. The Court holds that police conduct of this sort does not constitute an "unreasonable search" within the meaning of the Fourth Amendment. The Court reaches that startling conclusion by two independent analytical routes. First, the Court argues that, because the Fourth Amendment by its terms renders people secure in their "persons, houses, papers, and effects," it is inapplicable to trespasses upon land not lying within the curtilage of a dwelling. Ante, at 176-177, 80 L Ed 2d, at 222–223. Second, the Court contends that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." Ante, at 178, 80 L Ed 2d, at 224. Because I cannot agree with either of these propositions, I dissent.

I

The first ground on which the Court rests its decision is that the Fourth Amendment "indicates with some precision the places and things

these reasons, the law of trespass confers protections from intrusion by others far broader than those required by Fourth Amendment interests.

encompassed by its protections," and that real property is not included in the list of protected spaces and possessions. Ante, at 176, 80 L Ed 2d, at 222. This line of argument has several flaws. Most obviously, it is inconsistent with the results of many of our previous decisions, none of which the Court purports to overrule. For example, neither a public telephone booth nor a conversation conducted therein can fairly be described as a person, house, paper, or effect;[1] yet we have held that the Fourth Amendment forbids the police without a warrant to eavesdrop on such a conversation. Katz v United States, 389 US 347, 19 L Ed 2d 576, 88 S Ct 507 (1967). Nor can it plausibly

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be argued that an office or commercial establishment is covered by the plain language of the Amendment; yet we have held that such premises are entitled to constitutional protection if they are marked in a fashion that alerts the public to the fact that they are private. Marshall v Barlow's, Inc., 436 US 307, 311, 56 L Ed 2d 305, 98 S Ct 1816 (1978); G. M. Leasing Corp. v United States, 429 US 338, 358–359, 50 L Ed 2d 530, 97 S Ct 619 (1977).[2]

Indeed, the Court's reading of the plain language of the Fourth Amendment is incapable of explaining even its own holding in this case. The Court rules that the curtilage, a zone of real property surrounding a dwelling, is entitled to constitutional protection. Ante, at 180, 80 L Ed 2d, at 225. We are not told, however, whether the curtilage is a "house" or an "effect"—or why, if the curtilage can be incorporated into the list of things and spaces shielded by the Amendment, a field cannot.

The Court's inability to reconcile its parsimonious reading of the phrase "persons, houses, papers, and effects" with our prior decisions or even its own holding is a symptom of a more fundamental infirmity in the Court's reasoning. The Fourth Amendment, like the other central provisions of the Bill of Rights that loom large in our modern jurisprudence, was designed, not to prescribe with "precision" permissible and impermissible activities, but to identify a fundamental human liberty that should be shielded forever from government intrusion.[3] We do not construe constitutional provisions

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of this sort the way we do statutes, whose drafters can be expected to indicate with some comprehensiveness and exactitude the conduct they wish to forbid or control and to change those prescriptions when

1. The Court informs us that the Framers would have understood the term "effects" to encompass only personal property. Ante, at 177, n 7, 80 L Ed 2d, at 223. Such a construction of the term would exclude both a public phone booth and spoken words.

2. On the other hand, an automobile surely does constitute an "effect." Under the Court's theory, cars should therefore stand on the same constitutional footing as houses. Our cases establish, however, that car owners' diminished expectations that their cars will remain free from prying eyes warrants a corresponding reduction in the constitutional protection accorded cars. E.g., United States v Martinez-Fuerte, 428 US 543, 561, 49 L Ed 2d 1116, 96 S Ct 3074 (1976).

3. By their terms, the provisions of the Bill of Rights curtail only activities by the Federal Government, see Barron v Mayor and City Council of Baltimore, 7 Pet 243, 8 L Ed 672 (1833), but the Fourteenth Amendment subjects state and local governments to the most important of those restrictions, see, e.g., Cantwell v Connecticut, 310 US 296, 84 L Ed 1213, 60 S Ct 900, 128 ALR 1352 (1940) (First Amendment); Wolf v Colorado, 338 US 25, 93 L Ed 1782, 69 S Ct 1359 (1949) (Fourth Amendment).

they become obsolete.[4] Rather, we strive, when interpreting these seminal constitutional provisions, to effectuate their purposes—to lend them meanings that ensure that the liberties the Framers sought to protect are not undermined by the changing activities of government officials.[5]

The liberty shielded by the Fourth Amendment, as we have often acknowledged, is freedom "from unreasonable government intrusions into . . . legitimate expectations of privacy." United States v Chadwick, 433 US 1, 7, 53 L Ed 2d 538, 97 S Ct 2476 (1977). That freedom would be incompletely protected if only government conduct that impinged upon a person, house, paper, or effect were subject to constitutional scrutiny. Accordingly, we have repudiated the proposition that the Fourth Amendment applies only to a limited set of locales or kinds of property. In Katz v United States, we expressly rejected a proffered locational theory of the coverage of the Amendment, holding that it "protects people, not places." 389 US, at 251, 19 L Ed 2d 576, 88 S Ct 507. Since that time we have consistently adhered

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to the view that the applicability of the provision depends solely upon "whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." Smith v Maryland, 442 US 735, 740, 61 L Ed 2d 220, 99 S Ct 2577 (1979).[6] The Court's contention that, because a field is not a house or effect, it is not covered by the Fourth Amendment is inconsistent with this line of cases and with the understanding of the nature of

4. Cf. McCulloch v Maryland, 4 Wheat 316, 407, 4 L Ed 579 (1819) ("[W]e must never forget, that it is *a constitution* we are expounding." Such a document cannot be as detailed as a "legal code"; "[i]ts nature . . . requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves") (emphasis in original).

5. Our rejection of the mode of interpretation appropriate for statutes is perhaps clearest in our treatment of the First Amendment. That Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press" but says nothing, for example, about restrictions on expressive behavior or about access to the courts. Yet, to give effect to the purpose of the Amendment, we have applied it to regulations of conduct designed to convey a message, e.g., Edwards v South Carolina, 372 US 229, 9 L Ed 2d 697, 83 S Ct 680 (1963), and have accorded constitutional protection to the public's "right of access to criminal trials," Globe Newspaper Co. v Superior Court, 457 US 596, 604–605, 73 L Ed 2d 248, 102 S Ct 2613 (1982).

6. See also United States v Chadwick, 433 US 1, 7, 11, 53 L Ed 2d 538, 97 S Ct 2476 (1977) (disagreeing with the suggestion that the Fourth Amendment "protects only dwellings and other specifically designated locales"; asserting instead that the purpose of the Amendment "is to safeguard individuals from unreasonable government invasions of legitimate privacy interests"); Rakas v Illinois, 439 US 128, 143, 58 L Ed 2d 387, 99 S Ct 421 (1978) (holding that the determinative question is "whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place").

Our most recent decisions continue to rely on the conception of the purpose and scope of the Fourth Amendment that we enunciated in Katz. See, e.g., United States v Jacobsen, ante, at 113-118, 80 L Ed 2d 85, 104 S Ct 1652; Michigan v Clifford, 464 US 287, 292-293, 78 L Ed 2d 477, 104 S Ct 641 (1984); Illinois v Andreas, 463 US 765, 771, 77 L Ed 2d 1003, 103 S Ct 3319 (1983); United States v Place, 462 US 696, 706-707, 77 L Ed 2d 110, 103 S Ct 2637 (1983); Texas v Brown, 460 US 730, 738-740, 75 L Ed 2d 502, 103 S Ct 1535 (1983) (plurality opinion); United States v Knotts, 460 US 276, 280-281, 75 L Ed 2d 55, 103 S Ct 1081 (1983).

constitutional adjudication from which it derives.[7]

II

The second ground for the Court's decision is its contention that any interest a landowner might have in the privacy of his woods and fields is not one that "society is prepared to recognize as 'reasonable.'" Ante, at 177, 80 L Ed 2d, at 223 (quoting Katz v United States, 389 US, at 361, 19 L Ed 2d 576, 88 S Ct 507 (Harlan, J., concurring)).

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The mode of analysis that underlies this assertion is certainly more consistent with our prior decisions than that discussed above. But the Court's conclusion cannot withstand scrutiny.

As the Court acknowledges, we have traditionally looked to a variety of factors in determining whether an expectation of privacy asserted in a physical space is "reasonable." Ante, at 177-178, 80 L Ed 2d, at 223–224. Though those factors do not lend themselves to precise taxonomy, they may be roughly grouped into three categories. First, we consider whether the expectation at issue is rooted in entitlements defined by positive law. Second, we consider the nature of the uses to which spaces of the sort in question can be put. Third, we consider whether the person claiming a privacy interest manifested that interest to the public in a way that most people would understand and respect.[8] When the expectations of privacy asserted by petitioner Oliver and respondent Thornton[9] are examined through these lenses, it becomes clear that those expectations are entitled to constitutional protection.

A

We have frequently acknowledged that privacy interests are not coterminous with property rights. E.g., United States v Salvucci, 448 US 83, 91, 65 L Ed 2d 619, 100 S Ct 2547 (1980). However, because "property rights reflect society's explicit recognition

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of a person's authority to act as he wishes in certain areas, [they] should be considered in determining whether an individual's expectations of privacy are reasonable." Rakas v Illinois, 439 US 153, 128, 58 L Ed 2d 387, 99 S Ct 421 (1978) (Powell, J.,

7. Sensitive to the weakness of its argument that the "persons or things" mentioned in the Fourth Amendment exhaust the coverage of the provision, the Court goes on to analyze at length the privacy interests that might legitimately be asserted in "open fields." The inclusion of Parts III and IV in the opinion, coupled with the Court's reaffirmation of Katz and its progeny, ante, at 177, 80 L Ed 2d, at 223, strongly suggests that the plain-language theory sketched in Part II of the Court's opinion will have little or no effect on our future decisions in this area.

8. The privacy interests protected by the Fourth Amendment are not limited to expectations that physical areas will remain free from public and government intrusion. See supra, at 187-188, 80 L Ed 2d, at 230. The factors relevant to the assessment of the reasonableness of a non-spatial privacy interest may well be different from the three considerations discussed here. See, e.g., Smith v Maryland, 442 US 735, 747–748, 61 L Ed 2d 220, 99 S Ct 2577 (1979) (Stewart, J., dissenting); id., at 750–752, 61 L Ed 2d 220, 99 S Ct 2577 (Marshall, J., dissenting).

9. The Court does not dispute that Oliver and Thornton had subjective expectations of privacy, nor could it in view of the lower courts' findings on that issue. See United States v Oliver, No., CR80-00005-01-BG (WD Ky Nov. 14, 1980), App to Pet for Cert in No. 82-15, pp 19-20; Maine v Thornton, No. CR82-10 (Me Super Ct, Apr. 16, 1982), App to Pet for Cert in No. 82-1273, pp B-4—B-5.

concurring).[10] Indeed, the Court has suggested that, insofar as "[o]ne of the main rights attaching to property is the right to exclude others, . . . one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude." Id., at 144, n 12, 58 L Ed 2d 387, 99 S Ct 421 (opinion of the Court).[11]

It is undisputed that Oliver and Thornton each owned the land into which the police intruded. That fact alone provides considerable support for their assertion of legitimate privacy interests in their woods and fields. But even more telling is the nature of the sanctions that Oliver and Thornton could invoke, under local law, for violation of their property rights. In Kentucky, a knowing entry upon fenced or otherwise enclosed land, or upon unenclosed land conspicuously posted with signs excluding the public, constitutes criminal trespass. Ky Rev Stat §§ 511.070(1), 511.080, 511.090(4) (1975). The law in Maine is similar. An intrusion into "any place from [466 US 191] which [the intruder] may lawfully be excluded and which is posted in a manner prescribed by law or in a manner reasonably likely to come to the attention of intruders or which is fenced or otherwise enclosed" is a crime. Me Rev Stat Ann, Tit 17A, § 402(1)(C) (1964).[12] Thus, positive law not only recognizes the legitimacy of Oliver's and Thornton's insistence that strangers keep off their land, but subjects those who refuse to respect their wishes to the most severe of penalties—criminal liability. Under these circumstances, it is hard to credit the Court's assertion that Oliver's and Thornton's expectations of privacy were not of a sort that society is prepared to recognize as reasonable.

B

The uses to which a place is put are highly relevant to the assessment of a privacy interest asserted therein. Rakas v Illinois, supra, at

10. The Court today seeks to evade the force of this principle by contending that the law of property is designed to serve various "prophylactic" and "economic" purposes unrelated to the protection of privacy. Ante, at 183-184, and n 15, 80 L Ed 2d, at 227–228. Such efforts to rationalize the distribution of entitlements under state law are interesting and may have some explanatory power, but cannot support the weight the Court seeks to place upon them. The Court surely must concede that *one* of the purposes of the law of real property (and specifically the law of criminal trespass, see infra, this page and 191, and n 12, 80 L Ed 2d, at 232) is to define and enforce privacy interests—to empower some people to make whatever use they wish of certain tracts of land without fear that other people will intrude upon their activities. The views of commentators, old and new, as to other functions served by positive law are thus insufficient to support the Court's sweeping assertion that "in the case of open fields, the general rights of property . . . have little or no relevance to the applicability of the Fourth Amendment," ante, at 183-184, 80 L Ed 2d, at 227–228.

11. See also Rawlings v Kentucky, 448 US 98, 112, 65 L Ed 2d 633, 100 S Ct 2556 (1980) (Blackmun, J., concurring).

12. Cf. Comment to ALI, Model Penal Code § 221.2, p 87 (1980) ("The common thread running through these provisions [a sample of state criminal trespass laws] is the element of unwanted intrusion, usually coupled with some sort of notice to would-be intruders that they may not enter. Most people do not object to strangers tramping through woodland or over pasture or open range. On the other hand, intrusions into buildings, onto property fenced in a manner manifestly designed to exclude intruders, or onto any private property in defiance of actual notice to keep away is generally considered objectionable and under some circumstances frightening").

153, 58 L Ed 2d 387, 99 S Ct 421 (Powell, J., concurring). If, in light of our shared sensibilities, those activities are of a kind in which people should be able to engage without fear of intrusion by private persons or governmental officials, we extend the protection of the Fourth Amendment to the space in question, even in the absence of any entitlement derived from positive law. E.g., Katz v United States, 389 US, at 352–353, 19 L Ed 2d 576, 88 S Ct 507.[13]

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Privately owned woods and fields that are not exposed to public view regularly are employed in a variety of ways that society acknowledges deserve privacy. Many landowners like to take solitary walks on their property, confident that they will not be confronted in their rambles by strangers or policemen. Others conduct agricultural businesses on their property.[14] Some landowners use their secluded spaces to meet lovers, others to gather together with fellow worshippers, still others to engage in sustained creative endeavor. Private land is sometimes used as a refuge for wildlife, where flora and fauna are protected from human intervention of any kind.[15] Our respect for the freedom of landowners to use

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their posted "open fields" in ways such as these partially explains the seriousness with which the positive law regards deliberate invasions of such spaces, see supra, at 190-191, 80 L Ed 2d, at 232, and substantially reinforces the landowners' contention that their expectations of privacy are "reasonable."

C

Whether a person "took normal precautions to maintain his privacy" in a given space affects whether his interest is one protected by the

13. In most circumstances, this inquiry requires analysis of the sorts of uses to which a given space is susceptible, not the manner in which the person asserting an expectation of privacy in the space was in fact employing it. See, e.g., United States v Chadwick, 433 US, at 13, 53 L Ed 2d 538, 97 S Ct 2476. We make exceptions to this principle and evaluate uses on a case-by-case basis in only two contexts: when called upon to assess (what formerly was called) the "standing" of a particular person to challenge an intrusion by government officials into a area over which that person lacked primary control, see, e.g., Rakas v Illinois, 439 US, at 148–149, 58 L Ed 2d 387, 99 S Ct 421; Jones v United States, 362 US 257, 265–266, 4 L Ed 2d 697, 80 S Ct 725, 78 ALR2d 233 (1960), and when it is possible to ascertain how a person is using a particular space without violating the very privacy interest he is asserting, see, e.g., Katz v United States, 389 US, at 352, 19 L Ed 2d 576, 88 S Ct 507. (In cases of the latter sort, the inquiries described in this Part and in Part II-C, infra, are coextensive). Neither of these exceptions is applicable here. Thus, the majority's contention that, because the cultivation of marihuana is not an activity that society wishes to protect, Oliver and Thornton had no legitimate privacy interest in their fields, ante, at 182-183, and n 13, 80 L Ed 2d, at 227, reflects a misunderstanding of the level of generality on which the constitutional analysis must proceed.

14. We accord constitutional protection to businesses conducted in office buildings, see supra, at 185-186, 80 L Ed 2d, at 229; it is not apparent why businesses conducted in fields that are not open to the public are less deserving of the benefit of the Fourth Amendment.

15. This last-mentioned use implicates a kind of privacy interest somewhat different from those to which we are accustomed. It involves neither a person's interest in immunity from observation nor a person's interest in shielding from scrutiny the residues and manifestations of his personal life. Cf. Weinreb, Generalities of the Fourth Amendment, 42 U Chi L Rev 47, 52–54 (1974). It derives, rather, from a person's desire to preserve inviolate a portion of his world. The idiosyncracy of this interest does not, however, render it less deserving of constitutional protection.

Fourth Amendment. Rawlings v Kentucky, 448 US 98, 105, 65 L Ed 2d 633, 100 S Ct 2556 (1980).[16] The reason why such precautions are relevant is that we do not insist that a person who has a right to exclude others exercise that right. A claim to privacy is therefore strengthened by the fact that the claimant somehow manifested to other people his desire that they keep their distance.

Certain spaces are so presumptively private that signals of this sort are unnecessary; a homeowner need not post a "Do Not Enter" sign on his door in order to deny entrance to uninvited guests.[17] Privacy interests in other spaces are more ambiguous, and the taking of precautions is consequently more important; placing a lock on one's footlocker strengthens one's claim that an examination of its contents is impermissible. See United States v Chadwick, 433 US, at 11, 53 L Ed 2d 538, 97 S Ct 2476. Still other spaces are, by positive law and social convention, presumed accessible to members of the public *unless* the owner manifests his intention to exclude them.

Undeveloped land falls into the last-mentioned category. If a person has not marked the boundaries of his fields or woods in a way that informs passersby that they are not welcome,

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he cannot object if members of the public enter onto the property. There is no reason why he should have any greater rights as against government officials. Accordingly, we have held that an official may, without a warrant, enter private land from which the public is not excluded and make observations from that vantage point. Air Pollution Variance Board v Western Alfalfa Corp., 416 US 861, 865, 40 L Ed 2d 607, 94 S Ct 2114 (1974). Fairly read, the case on which the majority so heavily relies, Hester v United States, 265 US 57, 68 L Ed 898, 44 S Ct 445 (1924), affirms little more than the foregoing unremarkable proposition. From aught that appears in the opinion in that case, the defendants, fleeing from revenue agents who had observed them committing a crime, abandoned incriminating evidence on private land from which the public had not been excluded. Under such circumstances, it is not surprising that the Court was unpersuaded by the defendants' argument that the entry onto their fields by the agents violated the Fourth Amendment.[18]

16. See also Rakas v Illinois, supra, at 152, 58 L Ed 2d 387, 99 S Ct 421 (Powell, J., concurring); United States v Chadwick, supra, at 11, 53 L Ed 2d 538, 97 S Ct 2476; Katz v United States, supra, at 352, 19 L Ed 2d 576, 88 S Ct 507.

17. However, if the homeowner acts affirmatively to invite someone into his abode, he cannot later insist that his privacy interests have been violated. Lewis v United States, 385 US 206, 17 L Ed 2d 312, 87 S Ct 424 (1966).

18. An argument supportive of the position taken by the Court today might be constructed on the basis of an examination of the record in Hester. It appears that, in his approach to the house, one of the agents crossed a pasture fence. See Tr of Record in Hester v United States, OT 1923, No. 243, p 16. However, the Court, in its opinion, placed no weight upon—indeed, did not even mention—that circumstance.

In any event, to the extent that Hester may be read to support a rule any broader than that stated in Air Pollution Variance Board v Western Alfalfa Corp., 416 US 861, 40 L Ed 2d 607, 94 S Ct 2114 (1974), it is undercut by our decision in Katz, which repudiated the locational theory of the coverage of the Fourth Amendment enunciated in Olmstead v United States, 277 US 438, 72 L Ed 944, 48 S Ct 564, 66 ALR 376 (1928), and by the line of decisions originating in Katz, see supra, at 187-188, and n 6, 80 L Ed 2d, at 230-231.

A very different case is presented when the owner of undeveloped land has taken precautions to exclude the public. As indicated above, a deliberate entry by a private citizen onto private property marked with "No Trespassing" signs will expose him to criminal liability. I see no reason why a government official should not be obliged to respect such

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unequivocal and universally understood manifestations of a landowner's desire for privacy.[19]

In sum, examination of the three principal criteria we have traditionally used for assessing the reasonableness of a person's expectation that a given space would remain private indicates that interests of the sort asserted by Oliver and Thornton are entitled to constitutional protection. An owner's right to insist that others stay off his posted land is firmly grounded in positive law. Many of the uses to which such land may be put deserve privacy. And, by marking the boundaries of the land with warnings that the public should not intrude, the owner has dispelled any ambiguity as to his desires.

The police in these cases proffered no justification for their invasions of Oliver's and Thornton's privacy interests; in neither case was the entry legitimated by a warrant or by one of the established exceptions to the warrant requirement. I conclude, therefore, that the searches of their land violated the Fourth Amendment, and the evidence obtained in the course of those searches should have been suppressed.

III

A clear, easily administrable rule emerges from the analysis set forth above: Private land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the State in which the land lies is protected by the Fourth Amendment's proscription of unreasonable searches and seizures. One of the advantages of the foregoing rule is that

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it draws upon a doctrine already familiar to both citizens and government officials. In each jurisdiction, a substantial body of statutory and case law defines the precautions a landowner must take in order to avail himself of the sanctions of the criminal law. The police know that body of law, because they are entrusted with responsibility for enforcing it against the public; it therefore would not be difficult for the police to abide by it themselves.

By contrast, the doctrine announced by the Court today is incapable of determinate application. Police officers, making warrantless entries upon private land, will be obliged in the future to make on-the-spot judgments as to how far the curtilage extends, and to stay out-

19. Indeed, important practical considerations suggest that the police should not be empowered to invade land closed to the public. In many parts of the country, landowners feel entitled to use self-help in expelling trespassers from their posted property. There is thus a serious risk that police officers, making unannounced, warrantless searches of "open fields," will become involved in violent confrontations with irate landowners, with potentially tragic results. Cf. McDonald v United States, 335 US 451, 460–461, 93 L Ed 153, 69 S Ct 191 (1948) (Jackson, J., concurring).

side that zone.[20] In addition, we may expect to see a spate of litigation over the question of how much improvement is necessary to remove private land from the category of "unoccupied or undeveloped area" to which the "open fields exception" is now deemed applicable. See ante, at 180, n 11, 80 L Ed 2d, at 225.

The Court's holding not only ill serves the need to make constitutional doctrine "workable for application by rank-and-file, trained police officers," Illinois v Andreas, 463 US 765, 772, 77 L Ed 2d 1003, 103 S Ct 3319 (1983), it withdraws the shield of the Fourth Amendment from privacy interests that clearly deserve protection. By exempting from the coverage of the Amendment large areas of private land, the Court opens the way to investigative activities we would all find repugnant. Cf., e.g., United States v Lace, 669 F2d 46, 54 (CA2 1982) (Newman, J., concurring in result) ("[W]hen police officers execute military maneuvers on residential property for three weeks of round-the-clock surveillance, can that be called 'reasonable'?");

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State v Brady, 406 So 2d 1093, 1094–1095 (Fla 1981) ("In order to position surveillance groups around the ranch's airfield, deputies were forced to cross a dike, ram through one gate and cut the chain lock on another, cut or cross posted fences, and proceed several hundred yards to their hiding places"), cert granted, 456 US 988, 73 L Ed 2d 1282, 102 S Ct 2266 (1982).[21]

The Fourth Amendment, properly construed, embodies and gives effect to our collective sense of the degree to which men and women, in civilized society, are entitled "to be let alone" by their governments. Olmstead v United States, 277 US 438, 478, 72 L Ed 944, 48 S Ct 564, 66 ALR 376 (1928) (Brandeis, J., dissenting); cf. Smith v Maryland, 442 US, at 750, 61 L Ed 2d 220, 99 S Ct 2577 (Marshall, J., dissenting). The Court's opinion bespeaks and will help to promote an impoverished vision of that fundamental right.

I dissent.

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20. The likelihood that the police will err in making such judgments is suggested by the difficulty experienced by courts when trying to define the curtilage of dwellings. See, e.g., United States v Berrong, 712 F2d 1370, 1374, and n 7 (CA11 1983), cert pending, No. 83–988; United States v Van Dyke, 643 F2d 992, 993–994 (CA4 1981).

21. Perhaps the most serious danger in the decision today is that, if the police are permitted routinely to engage in such behavior, it will gradually become less offensive to us all. As Justice Brandeis once observed: "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law . . . ." Olmstead v United States, 277 US, at 485, 72 L Ed 944, 48 S Ct 564, 66 ALR 376 (dissenting opinion). See also Solem v Stumes, 465 US 638, 667, 79 L Ed 2d 579, 104 S Ct 1338 (1984) (Stevens, J., dissenting).

EDITOR'S NOTE

An annotation on "Supreme Court's development of "open fields doctrine" with respect to Fourth Amendment search and seizure protections," appears p 860, infra.

[413 US 49]

PARIS ADULT THEATRE I et al., Petitioners,

v

LEWIS R. SLATON, District Attorney, Atlanta Judicial Circuit, et al.

413 US 49, 37 L Ed 2d 446, 93 S Ct 2628, reh den 414 US 881, 38 L Ed 2d 128, 94 S Ct 27

[No. 71–1051]

Argued October 19, 1972. Decided June 21, 1973.

SUMMARY

Pursuant to Georgia law, state officials filed civil complaints in the Superior Court, Fulton County, Georgia, for a declaration that certain movies being shown at the defendants' "adult" theaters were obscene as defined in a Georgia criminal statute, and for an injunction against their continued presentation to the public. After a non-jury trial, the trial court concluded that even assuming that the films were "obscene," nevertheless their exhibition was constitutionally permissible since they were exhibited only to consenting adults, the defendants having given requisite notice to the public of the nature of the films and having afforded reasonable protection against exposure of the films to minors. The Supreme Court of Georgia reversed, holding that the movies were obscene, and that their exhibition at the defendants' theaters could be constitutionally prohibited, even though shown only to consenting adults (228 Ga 343, 185 SE2d 768).

On certiorari, the United States Supreme Court vacated and remanded. In an opinion by BURGER, Ch. J., expressing the views of five members of the court, it was held that (1) obscene, pornographic motion pictures, unprotected by the First Amendment, did not acquire constitutional immunity from state regulation simply because they were exhibited for consenting adults only, (2) the states were not constitutionally prohibited from concluding that the public interest required regulation of commercialized obscenity, notwithstanding the absence of conclusive proof of a connection between antisocial behavior and obscene material, (3) governmental regulation of obscenity was not precluded as violative of an individual's "free will" or right to "privacy," or as unconstitutional control of reason and intellect, and (4) nothing precluded a state from regulating exhibition of obscene motion pictures in "adult" theaters, provided that state law as written or authoritatively interpreted by state courts, met the First Amendment standards for determining obscenity as set forth in Miller v California, 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607.

Briefs of Counsel, p 1107, infra.

DOUGLAS, J., dissented on the ground that "obscenity" was protected by the First Amendment, thus requiring a constitutional amendment to establish any regime of censorship and punishment.

BRENNAN, J., joined by STEWART and MARSHALL, JJ., dissented, expressing the views that (1) the court's approach to the obscenity problem, initiated in Roth v United States (1967) 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304, should be abandoned, at least insofar as consenting adults were concerned, (2) "obscene" speech was incapable of definition with sufficient clarity to withstand attack on vagueness and overbreadth grounds, since no definition of obscenity, including that propounded in Miller v California, 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607, provided adequate notice of exactly what was prohibited from dissemination, (3) no such state interest in regulating morality as to consenting adults was shown as to justify interference with First Amendment guarantees, and (4) absent distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments should be viewed as prohibiting the state and federal governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly "obscene" contents, although the governments could perhaps regulate the manner of distribution of such material.

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Injunction § 18 — exhibition of obscene materials

1. Under Georgia law, the exhibition of materials found to be "obscene," as defined by a statute making it a criminal offense to distribute such materials, may be enjoined in a civil proceeding.

Constitutional Law § 930 — First Amendment — obscenity

2. With regard to the scope of regulation of obscene material permissible under the First Amendment, the United States Supreme Court does not undertake to tell the states what they must do, but rather undertakes to define the area in which they may chart their own course in dealing with obscene material.

Constitutional Law §§ 925.5, 930 — First Amendment — state regulation of obscenity

3. Obscene material is not protected by the First Amendment as a limita-

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

50 AM JUR 2d, Lewdness, Indecency, and Obscenity §§ 3–27

7 AM JUR PL & PR FORMS (Rev ed), Constitutional Law, Forms 51 et seq.

18 AM JUR PROOF OF FACTS 465, Obscenity—Motion Pictures

10 AM JUR TRIALS 1, Obscenity Litigation

US L ED DIGEST, Constitutional Law §§ 101, 930, 930.1; Indecency, Lewdness, and Obscenity § 1

ALR DIGESTS, Constitutional Law §§ 792(1), 795; Indecency, Lewdness, and Obscenity §§ 1, 3

L ED INDEX TO ANNO, Censorship; Indecency; Motion Pictures

ALR QUICK INDEX, Freedom of Speech and Press; Indecency, Lewdness, and Obscenity; Motion Pictures; Privacy

FEDERAL QUICK INDEX, Censorship; Lewdness, Indecency, and Obscenity; Motion Pictures; Privacy

ANNOTATION REFERENCES

What provisions of the Federal Constitution's Bill of Rights are applicable to the states. 18 L Ed 2d 1388, 23 L Ed 2d 985.

Constitutionality of regulation of obscene motion pictures. 22 L Ed 2d 949.

The Supreme Court and the right of free speech and press. 93 L Ed 1151, 2 L Ed 2d 1706, 11 L Ed 2d 1116, 16 L Ed 2d 1053, 21 L Ed 2d 976.

Constitutionality of federal and state regulation of obscene literature. 1 L Ed 2d 2211, 4 L Ed 2d 1821.

Validity of procedures designed to protect the public against obscenity. 5 ALR3d 1214.

Modern concept of obscenity. 5 ALR3d 1158.

What amounts to an obscene play or book within prohibition statute. 81 ALR 801.

Power of municipality in respect of inspection and censorship of motion picture films. 126 ALR 1363.

tion on the state police power by virtue of the Fourteenth Amendment.

Constitutional Law § 930 — First Amendment — determination of obscenity

4. Assuming the use of a constitutionally acceptable standard for determining what is obscene material unprotected by the First Amendment, a state's civil procedure for determining obscenity is valid, where under such procedure, the local district attorney seeks an injunction against exhibition of allegedly obscene material and no restraint is placed on such exhibition until after a full adversary proceeding and a final judgment determining that the material is constitutionally unprotected—the exhibitor or purveyor of materials thus being given the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation.

Evidence §§ 422, 961 — obscenity — expert testimony

5. In a civil action instituted in a state court by a local district attorney for a declaration that certain motion picture films were obscene and for an injunction against the defendants' exhibition of such films at their theaters, it is not error to fail to require expert affirmative evidence that the materials were obscene, when the materials themselves were actually placed in evidence; the films are the best evidence of what they represent.

Evidence § 641 — expert testimony — purpose

6. Expert testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand.

Constitutional Law § 930 — First Amendment — obscene motion pictures

7. Obscene, pornographic motion picture films do not acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only.

Indecency, Lewdness, and Obscenity § 1 — state regulation

8. The states have a legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation, including so-called "adult" motion picture theaters from which minors are excluded, as long as such regulations do not run afoul of specific constitutional prohibitions.

Indecency, Lewdness, and Obscenity § 1 — publications

9. The primary requirements of decency may be enforced against obscene publications.

Indecency, Lewdness, and Obscenity § 1 — regulation — state interest

10. There are legitimate state interests at stake in stemming the tide of commercialized obscenity with regard to consenting adults, even assuming that it is feasible to enforce effective safeguards only against exposure to juveniles and to the passerby; such interests include the interests of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself.

Indecency, Lewdness, and Obscenity § 1 — rights of government

11. With regard to the regulation of obscenity, there is a right of the nation and of the states to maintain a decent society.

Indecency, Lewdness, and Obscenity § 1 — state regulation — antisocial behavior

12. Even though there is no conclusive proof of a connection between antisocial behavior and obscene material, a state legislature may reasonably determine that such a connection does or might exist, and may legitimately act on such a conclusion to protect the social interest in order and morality.

Courts § 109.5 — review of legislation — empirical uncertainties

13. It is not for the United States Supreme Court to resolve empirical uncertainties underlying state legislation, save in the exceptional case where the legislation plainly impinges upon rights protected by the Constitution itself.

Statutes § 13 — validity — unprovable assumptions

14. The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find the statute unconstitutional.

Indecency, Lewdness, and Obscenity § 1 — state regulation

15. The sum of experience affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex; nothing in the Constitution prohibits a state from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.

Indecency, Lewdness, and Obscenity § 1 — government regulation — individual "free will"

16. Governmental regulation of obscene materials is not precluded on the theory that individual "free will" must govern even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy.

Constitutional Law § 935.5; Securities Regulation § 5 — First Amendment — "blue sky" laws

17. Neither the First Amendment nor "free will" precludes states from having "blue sky" laws to regulate what sellers of securities may write or publish about their wares; such laws are to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition.

Indecency, Lewdness, and Obscenity § 1 — state regulation — "laissez-faire" policy

18. The states may elect to follow a "laissez-faire" policy as to the obscenity-pornography problem, dropping all controls on commercialized obscenity, but nothing in the Constitution compels the states to do so with regard to matters falling within state jurisdiction.

Courts § 103 — wisdom and propriety of legislation

19. The United States Supreme Court does not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.

Constitutional Law § 101 — right to privacy — obscene materials

20. State regulation of access by consenting adults to obscene material does not violate any constitutionally protected right to privacy enjoyed by customers of "adult" motion picture theaters.

Constitutional Law § 525 — Fourteenth Amendment — right to privacy

21. The right to privacy guaranteed by the Fourteenth Amendment—which right includes only those personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty"—encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing; there is no "fundamental" privacy right "implicit in the concept of ordered liberty" to watch obscene movies in places of public accommodation.

Constitutional Law §§ 101, 930 — First Amendment — privacy — obscene material

22. Obscene material unprotected by the First Amendment does not in itself carry with it a penumbra of constitutionally protected privacy; with re-

gard to the First Amendment right of an individual to possess obscene material in the privacy of his home, such privacy of the home is not to be equated with a "zone" of "privacy" that follows a distributor or a consumer of obscene materials wherever he goes.

Constitutional Law § 930 — First Amendment — obscene materials

23. The First Amendment protection relating to possession of obscene materials is restricted to possession of such material in one's home.

Constitutional Law § 101 — right to privacy — scope

24. The constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not concerned with a particular place, but with a protected intimate relationship; such protection extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved; there is no necessary or legitimate expectation of privacy extending to marital intercourse on a street corner or a theater stage.

Constitutional Law § 930; Indecency, Lewdness, and Obscenity § 1 — obscene conduct — state regulation

25. Conduct or depictions of conduct that the state police power can prohibit as obscene on a public street does not become automatically protected by the Constitution merely because the conduct is moved to a bar or a "live" theater stage, any more than a "live" performance of a man and woman locked at a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue.

Constitutional Law § 930; Indecency, Lewdness, and Obscenity § 1 — obscene material — state regulation

26. A state regulation preventing unlimited display or distribution of obscene material, which by definition lacks any serious literary, artistic, political, or scientific value as communication, does not constitute unconstitutional control of reason and intellect; where communication of ideas protected by the First Amendment is not involved, nor any of the areas or zones of constitutionally protected privacy, the mere fact that, as a consequence, some human "utterances" or "thoughts" may be incidentally affected does not bar a state from acting to protect legitimate state interests.

Food and Drugs § 1 — government regulation

27. Government regulation of drug sales is not prohibited by the Constitution.

Constitutional Law § 101; Indecency, Lewdness, and Obscenity § 1 — privilege of consenting adults — state regulation

28. Conduct which directly involves "consenting adults" only does not, for that sole reason, have a special claim to constitutional privilege; commercial exploitation of depictions, descriptions, or exhibitions of obscene conduct on commercial premises open to the adult public falls within a state's broad power to regulate commerce and protect the public environment.

Indecency, Lewdness, and Obscenity § 1 — state regulation

29. The states have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize the states' right to maintain a decent society.

Constitutional Law § 930.1; Indecency, Lewdness, and Obscenity § 1 — obscene motion pictures — state regulation

30. Nothing precludes a state from the regulation of obscene motion pictures exhibited in theaters, notwithstanding that they are exhibited for consenting adults only, provided that state law, as written or authoritatively

interpreted by state courts, meets the First Amendment standards requiring that the basic guideliness for determining obscenity must be (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law as written or construed, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

SYLLABUS BY REPORTER OF DECISIONS

Respondents sued under Georgia civil law to enjoin the exhibiting by petitioners of two allegedly obscene films. There was no prior restraint. In a jury-waived trial, the trial court (which did not require "expert" affirmative evidence of obscenity) viewed the films and thereafter dismissed the complaints on the ground that the display of the films in commercial theaters to consenting adult audiences (reasonable precautions having been taken to exclude minors) was "constitutionally permissible." The Georgia Supreme Court reversed, holding that the films constituted "hard-core" pornography not within the protection of the First Amendment. *Held:*

1. Obscene material is not speech entitled to First Amendment protection. Miller v California, 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607; Roth v United States, 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304.

2. The Georgia civil procedure followed here (assuming use of a constitutionally acceptable standard for determining the issue of obscenity vel non) comported with the standards of Teitel Film Corp. v Cusack, 390 US 139, 19 L Ed 2d 966, 88 S Ct 754; Freedman v Maryland, 380 US 51, 13 L Ed 2d 649, 85 S Ct 734; and Kingsley Books, Inc. v Brown, 354 US 436, 1 L Ed 2d 1469, 77 S Ct 1325.

3. It was not error not to require expert affirmative evidence of the films' obscenity, since the films (which were the best evidence of what they depicted) were themselves placed in evidence.

4. States have a legitimate interest in regulating commerce in obscene material and its exhibition in places of public accommodation, including "adult" theaters.

(a) There is a proper state concern with safeguarding against crime and the other arguably ill effects of obscenity by prohibiting the public or commercial exhibition of obscene material. Though conclusive proof is lacking, the States may reasonably determine that a nexus does or might exist between antisocial behavior and obscene material, just as States have acted on unprovable assumptions in other areas of public control.

(b) Though States are free to adopt a laissez faire policy toward commercialized obscenity, they are not constitutionally obliged to do so.

(c) Exhibition of obscene material in places of public accommodation is not protected by any constitutional doctrine of privacy. A commercial theater cannot be equated with a private home; nor is there here a privacy right arising from a special relationship, such as marriage. Stanley v Georgia, 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243; Griswold v Connecticut, 381 US 479, 14 L Ed 2d 510, 85 S Ct 1678, distinguished. Nor can the privacy of the home be equated with a "zone" of "privacy" that follows a consumer of obscene materials whereever he goes. United States v Orito, 413 US 139, 37 L Ed 2d 513, 93 S Ct 2674; United States v 12 200-Ft. Reels of Film, 413 US 123, 37 L Ed 2d 500, 93 S Ct 2665.

(d) Preventing the unlimited display of obscene material is not thought control.

(e) Not all conduct directly involving "consenting adults" only has a claim to constitutional protection.

5. The Georgia obscenity laws involved herein should now be reevaluated in the light of the First Amendment standards newly enunciat-

ed by the Court in Miller v California, 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607.

228 Ga 343, 185 SE2d 768, vacated and remanded.

Burger, C. J., delivered the opinion of the Court, in which White, Blackmun, Powell, and Rehnquist, JJ., joined. Douglas, J., filed a dissenting opinion, post, p 70, 37 L Ed 2d, p 465. Brennan, J., filed a dissenting opinion, in which Stewart and Marshall, JJ., joined, post, p 73, 37 L Ed 2d, p 467.

APPEARANCES OF COUNSEL

Robert Eugene Smith argued the cause for petitioners.

Thomas E. Moran argued the cause for respondent.

Briefs of Counsel, p 1107, infra.

OPINION OF THE COURT

[413 US 50]

Mr. Chief Justice **Burger** delivered the opinion of the Court.

[1] Petitioners are two Atlanta, Georgia, movie theaters and their owners and managers, operating in the

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style of "adult" theaters. On December 28, 1970, respondents, the local state district attorney and the solicitor for the local state trial court, filed civil complaints in that court alleging that petitioners were exhibiting to the public for paid admission two allegedly obscene films, contrary to Georgia Code Ann § 26–2101.[1] The two films in question, "Magic Mirror" and "It All Comes Out in the End," depict sexual conduct characterized

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by the Georgia Supreme Court as "hard core pornography" leaving "little to the imagination."

Respondents' complaints, made on behalf of the State of Georgia, demanded that the two films be declared obscene and that petitioners be enjoined from exhibiting the films. The exhibition of the films was not enjoined, but a temporary injunction was granted ex parte by the local trial court, restraining petitioners from destroying the films or removing them from the jurisdiction. Petitioners were further ordered to have one print each of the films in court on January 13,

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[1] 1. This is a civil proceeding. Georgia Code Ann § 26–2101 defines a criminal offense, but the exhibition of materials found to be "obscene" as defined by that statute may be enjoined in a civil proceeding under Georgia case law. 1024 Peachtree Corp. v Slaton, 228 Ga 102, 184 SE2d 144 (1971); Walter v Slaton, 227 Ga 676, 182 SE2d 464 (1971); Evans Theatre Corp. v Slaton, 227 Ga 377, 180 SE2d 712 (1971). See infra, at 54. Georgia Code Ann § 26–2101 reads in relevant part:

Distributing obscene materials.

"(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do . . . .

"(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. . . .

. . . . . .

"(d) A person convicted of distributing obscene material shall for the first offense be punished as for a misdemeanor, and for any subsequent offense shall be punished by imprisonment for not less than one nor more than five years, or by a fine not to exceed $5,000, or both."

The constitutionality of Georgia Code Ann § 26–2101 was upheld against First Amendment and due process challenges in Gable v Jenkins, 309 F Supp 998 (ND Ga 1969), affd per curiam, 397 US 592, 25 L Ed 2d 595, 90 S Ct 1351 (1970).

1971, together with the proper viewing equipment.

On January 13, 1971, 15 days after the proceedings began, the films were produced by petitioners at a jury-waived trial. Certain photographs, also produced at trial, were stipulated to portray the single entrance to both Paris Adult Theatre I and Paris Adult Theatre II as it appeared at the time of the complaints. These photographs show a conventional, inoffensive theater entrance, without any pictures, but with signs indicating that the theaters exhibit "Atlanta's Finest Mature Feature Films." On the door itself is a sign saying: "Adult Theatre—You must be 21 and able to prove it. If viewing the nude body offends you, Please Do Not Enter."

The two films were exhibited to the trial court. The only other state evidence was testimony by criminal investigators that they had paid admission to see the films and that nothing on the outside of the theater indicated the full nature of what was shown. In particular, nothing indicated that the films depicted—as they did—scenes of simulated fellatio, cunnilingus, and group sex intercourse. There was no evidence presented that minors had ever entered the theaters. Nor was there evidence presented that petitioners had a systematic policy of barring minors, apart from posting signs at the entrance. On April 12, 1971, the trial judge dismissed

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respondents' complaints. He assumed "that obscenity is established," but stated:

> "It appears to the Court that the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible."

On appeal, the Georgia Supreme Court unanimously reversed. It assumed that the adult theaters in question barred minors and gave a full warning to the general public of the nature of the films shown, but held that the films were without protection under the First Amendment. Citing the opinion of this Court in United States v Reidel, 402 US 351, 28 L Ed 2d 813, 91 S Ct 1410 (1971), the Georgia court stated that "the sale and delivery of obscene material to willing adults is not protected under the first amendment." The Georgia court also held Stanley v Georgia, 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243 (1969), to be inapposite since it did not deal with "the commercial distribution of pornography, but with the right of Stanley to possess, in the privacy of his home, pornographic films." 228 Ga 343, 345, 185 SE2d 768, 769 (1971). After viewing the films, the Georgia Supreme Court held that their exhibition should have been enjoined, stating:

> "The films in this case leave little to the imagination. It is plain what they purport to depict, that is, conduct of the most salacious character. We hold that these films are also hard core pornography, and the showing of such films should have been enjoined since their exhibition is not protected by the first amendment." 228 Ga, at 347, 185 SE2d, at 770.

I

[2, 3] It should be clear from the outset that we do not undertake to tell the States what they must do, but

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rather to define the area in which they may chart their own course in dealing with obscene ma-

terial. This Court has consistently held that obscene material is not protected by the First Amendment as a limitation on the state police power by virtue of the Fourteenth Amendment. Miller v California, 413 US at 23–25, 37 L Ed 2d at 430–431; Kois v Wisconsin, 408 US 229, 230, 33 L Ed 2d 312, 92 S Ct 2245 (1972); United States v Reidel, 402 US, at 354, 28 L Ed 2d 813; Roth v United States, 354 US 476, 485, 1 L Ed 2d 1498, 77 S Ct 1304 (1957).

Georgia case law permits a civil injunction of the exhibition of obscene materials. See 1024 Peachtree Corp. v Slaton, 228 Ga 102, 184 SE2d 144 (1971); Walter v Slaton, 227 Ga 676, 182 SE2d 464 (1971); Evans Theatre Corp. v Slaton, 227 Ga 377, 180 SE2d 712 (1971). While this procedure is civil in nature, and does not directly involve the state criminal statute proscribing exhibition of obscene material,[2] the Georgia case law permitting civil injunction does adopt the definition of "obscene materials" used by the criminal statute.[3] Today, in Miller v California, supra, we have

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sought to clarify the constitutional definition of obscene material subject to regulation by the States, and we vacate and remand this case for reconsideration in light of Miller.

[4] This is not to be read as disapproval of the Georgia civil procedure employed in this case, assuming the use of a constitutionally acceptable standard for determining what is unprotected by the First Amendment. On the contrary, such a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation.[4] See Kingsley Books, Inc. v Brown, 354 US 436, 441–444, 1 L Ed 2d 1469, 77 S Ct 1325 (1957). Here, Georgia imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected.[5] Thus the standards of

2. See Georgia Code Ann § 26–2101, set out supra, at 51 n 1, 37 L Ed 2d at 453.

3. In Walter v Slaton, 227 Ga 676, 182 SE2d 464 (1971), the Georgia Supreme Court described the cases before it as follows:
"Each case was commenced as a civil action by the District Attorney of the Superior Court of Fulton County jointly with the Solicitor of the Criminal Court of Fulton County. In each case the plaintiffs alleged that the defendants named therein were conducting a business of exhibiting motion picture films to members of the public; that they were in control and possession of the described motion picture film which they were exhibiting to the public on a fee basis; that said film 'constitutes a flagrant violation of Ga Code § 26–2101 in that the sole and dominant theme of the motion picture film . . . considered as a whole, and applying contemporary standards, appeals to the prurient interest in sex and nudity, and that said motion picture film is utterly and absolutely without any redeeming social value whatsoever and transgresses beyond the customary limits of candor in describing and discussing sexual matters.'" Id., at 676–677, 182 SE2d, at 465.

4. This procedure would have even more merit if the exhibitor or purveyor could also test the issue of obscenity in a similar civil action, prior to any exposure to criminal penalty. We are not here presented with the problem of whether a holding that materials were not obscene could be circumvented in a later proceeding by evidence of pandering. See Memoirs v Massachusetts, 383 US 413, 458 n 3, 16 L Ed 2d 1, 86 S Ct 975 (1966) (Harlan, J., dissenting); Ginzburg v United States, 383 US 463, 496, 16 L Ed 2d 31, 86 S Ct 942 (1966) (Harlan, J., dissenting).

5. At the specific request of petitioners' counsel, the copies of the films produced for the trial court were placed in the

Blount v Rizzi, 400 US 410, 417, 27 L Ed 2d 498, 91 S Ct 423 (1971); Teitel Film Corp. v Cusack, 390 US 139, 141–142, 19 L Ed 2d 966, 88 S Ct 754 (1968); Freedman v Maryland, 380 US 51, 58–59, 13 L Ed 2d 649, 85 S Ct 734 (1965), and Kingsley Books, Inc. v Brown, supra, at 443–445, 1 L Ed 2d 1469, were met. Cf. United States v Thirty-seven Photographs, 402 US 363, 367–369, 28 L Ed 2d 822, 91 S Ct 1400 (1971) (opinion of White, J.).

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[5, 6] Nor was it error to fail to require "expert" affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence. United States v Groner, 479 F2d 577, 579–586 (CA5 1973); id., at 586–588 (Ainsworth, J., concurring); id., 586–589 (Clark, J., concurring); United States v Wild, 422 F2d 34, 35–36 (CA2 1969), cert denied, 402 US 986, 29 L Ed 2d 152, 91 S Ct 1644 (1971); Kahm v United States, 300 F2d 78, 84 (CA5), cert denied, 369 US 859, 8 L Ed 2d 18, 82 S Ct 949 (1962); State v Amato, 49 Wis 2d 638, 645, 183 NW2d 29, 32 (1971), cert denied sub nom Amato v Wisconsin, 404 US 1063, 30 L Ed 2d 751, 92 S Ct 735 (1972). See Smith v California, 361 US 147, 172, 4 L Ed 2d 205, 80 S Ct 215 (1959) (Harlan, J., concurring and dissenting); United States v Brown, 328 F Supp 196, 199 (ED Va 1971). The films, obviously, are the best evidence of what they represent.[6] "In the cases in which this Court has decided obscenity questions since Roth, it has regarded the materials as sufficient in themselves for the determination of the question." Ginzburg v United States, 383 US 463, 465, 16 L Ed 2d 31, 86 S Ct 942 (1966).

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II

[7–9] We categorically disapprove the theory, apparently adopted by the trial judge, that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only. This holding was properly rejected by the Georgia Supreme Court. Although we have often pointedly recognized the high importance of the state interest in regulating the exposure of obscene materials to juveniles and unconsenting adults, see Miller v California, supra, at 18–20, 37 L Ed 2d at 427–428; Stanley v Georgia, supra, at 567, 22 L Ed 2d 542; Redrup v New York, 486 US 767, 769, 18 L Ed 2d 515, 87 S Ct 1414 (1967), this Court has never

"administrative custody" of that court pending the outcome of this litigation.

[6] 6. This is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. Cf. 2 J. Wigmore, Evidence §§ 556, 559 (3d ed) (1940). No such assistance is needed by jurors in obscenity cases; indeed the "expert witness" practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony. See United States v Groner, 479 F2d —, — (slip opinion, at 19–20) (1973); id., — (slip opinion, pp 24–25) (Ainsworth, J., concurring). "Simply stated, hard core pornography . . . can and does speak for itself." United States v Wild, 422 F2d, at 34, 36 (CA2 1970), cert denied, 402 US 986, 29 L Ed 2d 152, 91 S Ct 1644 (1971). We reserve judgment, however, on the extreme case, not presented here, where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest. See Mishkin v New York, 383 US 502, 508–510, 16 L Ed 2d 56, 86 S Ct 958 (1966); United States v Klaw, 350 F2d 155, 167–168 (CA2 1965).

declared these to be the only legitimate state interests permitting regulation of obscene material. The States have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation, as long as these regulations do not run afoul of specific constitutional prohibitions. See United States v Thirty-seven Photographs, supra, at 376–377, 28 L Ed 2d 822 (opinion of White, J.); United States v Reidel, 402 US, at 354–356, 28 L Ed 813. Cf. United States v Thirty-seven Photographs, supra, at 378, 28 L Ed 2d 822 (Stewart, J., concurring). "In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that 'the primary requirements of decency may be enforced against obscene publications.' [Near v Minnesota, 283 US 697, 716 (1931)] [75 L Ed 1357, 51 S Ct 625]." Kingsley Books, Inc. v Brown, supra, at 440, 1 L Ed 2d 1469.

[10, 11] In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passersby.[7]

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Rights and interests "other than those of the advocates are involved." Breard v Alexandria, 341 US 622, 642, 95 L Ed 1233, 71 S Ct 920, 35 ALR2d 335 (1951). These include the interest of the public in the equality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself. The Hill-Link Minority Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable correlation between obscene material and crime.[8] Quite

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apart from sex

7. It is conceivable that an "adult" theater can—if it really insists—prevent the exposure of its obscene wares to juveniles. An "adult" bookstore, dealing in obscene books, magazines, and pictures, cannot realistically make this claim. The Hill-Link Minority Report of the Commission on Obscenity and Pornography emphasizes evidence (the Abelson National Survey of Youth and Adults) that, although most pornography may be bought by elders, "the heavy users and most highly exposed people to pornography are adolescent females (among women) and adolescent and young adult males (among men)." The Report of the Commission on Obscenity and Pornography 401 (1970). The legitimate interest in preventing exposure of juveniles to obscene materials cannot be fully served by simply barring juveniles from the immediate physical premises of "adult" bookstores, when there is a flourishing "outside business" in these materials.

8. The Report of the Commission on Obscenity and Pornography 390–412 (1970) (Hill-Link Minority Report). For a discussion of earlier studies indicating "a division of thought [among behavioral scientists] on the correlation between obscenity and socially deleterious behavior," Memoirs v Massachusetts, supra, at 451, 16 L Ed 2d 1, and references to expert opinions that obscene material may induce crime and antisocial conduct, see id., at 451–453, 16 L Ed 2d 1 (Clark, J., dissenting). As Mr. Justice Clark emphasized: "While erotic stimulation caused by pornography may be legally insignificant in itself, there are medical experts who believe that such stimulation frequently manifests itself in criminal sexual behavior or other antisocial conduct. For example, Dr. George W. Henry of Cornell University has expressed the opinion that obscenity, with its exaggerated and morbid emphasis on sex, particularly abnormal and perverted practices, and its unrealistic presentation of sexual behavior and attitudes, may induce antisocial conduct by the average person. A number of so-

crimes, however, there remains one problem of large proportions aptly described by Professor Bickel:

> "It concerns the tone of the society, the mode, or to use terms that have perhaps greater currency, the style and quality of life, now and in the future. A man may be entitled to read an obscene book in his room, or expose himself indecently there . . . . We should protect his privacy. But if he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places—discreet, if you will, but accessible to all—with others who share his tastes, *then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies.* Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not." 22 The Public Interest 25–26 (Winter 1971).[9] (Emphasis added.)

As Mr. Chief Justice Warren stated, there is a "right of the Nation and of the States to maintain a decent society . . . . ,"

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Jacobellis v Ohio, 378 US 184, 199, 12 L Ed 2d 793, 84 S Ct 1676 (1964) (dissenting opinion).[10] See Memoirs v Massachusetts, 383 US 413, 457, 16 L Ed 2d 1, 86 S Ct 975 (1966) (Harlan, J., dissenting); Beauharnais v Illinois, 343 US 250, 256–257, 96 L Ed 919, 72 S Ct 725 (1952); Kovacs v Cooper, 336 US 77, 86–88, 93 L Ed 513, 69 S Ct 448, 10 ALR2d 608 (1949).

[12, 13] But, it is argued, there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society. It is urged on behalf of the petitioners that, absent such a demonstration, any kind of state regulation is "impermissible." We reject this argument. It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself.[11]

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ciologists think that this material may have adverse effects upon individual mental health, with potentially disruptive consequences for the community.

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"Congress and the legislatures of every State have enacted measures to restrict the distribution of erotic and pornographic material, justifying these controls by reference to evidence that antisocial behavior may result in part from reading obscenity." Id., at 452–453, 16 L Ed 2d 1 (footnote omitted).

9. See also Berns, Pornography vs Democracy: The Case for Censorship, in 22 The Public Interest 3 (Winter 1971); van den Haag, in Censorship: For & Against 156–157 (H. Hart ed 1971).

10. "In this and other cases in this area of the law, which are coming to us in ever-increasing numbers, we are faced with the resolution of rights basic both to individuals and to society as a whole. Specifically, we are called upon to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments." Jacobellis v Ohio, supra, at 199, 12 L Ed 2d 793 (Warren, C. J., dissenting).

11. Mr. Justice Holmes stated in another context, that:

"[T]he proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court

Mr. Justice Brennan, speaking for the Court in Ginsberg v New York, 390 US 629, 642–643, 20 L Ed 2d 195, 88 S Ct 1274 (1968), said: "We do not demand of legislatures 'scientifically certain criteria of legislation.' Noble State Bank v Haskell, 219 US 104, 110, [55 L Ed 112, 31 S Ct 186]." Although there is no conclusive proof of a connection between antisocial behavior

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and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist. In deciding Roth, this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect *"the social interest in order and morality."* Roth v United States, 354 US, at 485, 1 L Ed 2d 1498, quoting Chaplinsky v New Hampshire, 315 US 568, 572, 86 L Ed 1031, 62 S Ct 766 (1942) (emphasis added in Roth).[12]

From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs. See Ferguson v Skrupa, 372 US 726, 730, 10 L Ed 2d 93, 83 S Ct 1028, 95 ALR2d 1347 (1963); Breard v Alexandria, 341 US, at 632–633, 641–645, 95 L Ed 1233, 35 ALR2d 335; Lincoln Federal Labor Union v Northwestern Iron & Metal Co., 335 US 525, 536–537, 93 L Ed 212, 69 S Ct 251, 6 ALR2d 473 (1949). The same is true of the federal securities and antitrust laws and a host of federal regulations. See SEC v Capital Gains Research Bureau, Inc., 375 US 180, 186–195, 11 L Ed 2d 237, 84 S Ct 275 (1963); American Power & Light Co. v SEC, 329 US 90, 99–103, 91 L Ed 103, 67 S Ct 133 (1946); North American Co. v SEC, 327 US 686, 705–707, 90 L Ed 945, 66 S Ct 785 (1946), and cases cited. See also Brooks v United States, 267 US 432, 436–437, 69 L Ed 699, 45 S Ct 345, 37 ALR 1407 (1925), and Hoke v United States, 227 US 308, 322, 57 L Ed 523, 33 S Ct 281 (1913). On the basis of these assumptions both Congress and state legislatures have, for example, drastically restricted associational rights by adopting antitrust laws, and have strictly regulated public expression by issuers of and dealers in securities, profit sharing "coupons," and "trading stamps,"

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commanding what they must and must not publish and announce. See Sugar Institute, Inc. v United States, 297 US 553, 597–602, 80 L Ed 859, 56 S Ct 629 (1936); Merrick v N. W. Halsey & Co. 242 US 568, 584–589, 61 L Ed 498, 37 S Ct 227 (1917); Caldwell v Sioux Falls Stock Yards Co. 242 US 559, 567–568, 61 L Ed 493, 37 S Ct 224 (1917); Hall v Geiger-Jones Co. 242 US 539, 548–552, 61 L Ed 480, 37 S Ct 217 (1917); Tanner v Little, 240 US 369, 383–386, 60 L Ed 691, 36 S Ct 379 (1916); Rast v Van Deman & Lewis Co. 240 US 342, 363–368, 60 L Ed 679, 36 S Ct 370 (1916). Un-

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may happen to entertain." Tyson & Brother v Banton, 273 US 418, 446, 71 L Ed 718, 47 S Ct 426, 58 ALR 1236 (1927) (dissenting opinion joined in by Brandeis, J.).

12. *"It has been well observed that such* [lewd and obscene] *utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."* Roth v United States, 354 US 476, 485, 1 L Ed 2d 1498, 77 S Ct 1304 (1957), quoting Chaplinsky v New Hampshire, 315 US 568, 572, 86 L Ed 1031, 62 S Ct 766 (1942) (emphasis added in Roth).

derstandably those who entertain an absolutist view of the First Amendment find it uncomfortable to explain why rights of association, speech, and press should be severely restrained in the marketplace of goods and money, but not in the marketplace of pornography.

[14] Likewise, when legislatures and administrators act to protect the physical environment from pollution and to preserve our resources of forests, streams, and parks, they must act on such imponderables as the impact of a new highway near or through an existing park or wilderness area. See Citizens to Preserve Overton Park v Volpe, 401 US 402, 417–420, 28 L Ed 2d 136, 91 S Ct 814 (1971). Thus, § 18(a) of the Federal-Aid Highway Act of 1968, 23 USC § 138 [23 USCS § 138], and the Department of Transportation Act of 1966, as amended, 82 Stat 824, 49 USC § 1653(f) [49 USCS § 1653(f)], have been described by Mr. Justice Black as "a solemn determination of the highest law-making body of this Nation that the beauty and health-giving facilities of our parks are not to be taken away for public roads without hearings, fact-findings, and policy determinations under the supervision of a Cabinet officer . . . ." Citizens to Preserve Overton Park, supra, at 421, 28 L Ed 2d 136 (separate opinion joined by Brennan, J.). The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional.

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[15] If we accept the unprovable assumption that a complete education requires certain books, see Board of Education v Allen, 392 US 236, 245, 20 L Ed 2d 1060, 88 S Ct 1923 (1968), and Johnson v New York State Education Depart., 449 F2d 871, 882–883 (CA2 1971) (dissenting opinion), vacated and remanded to consider mootness, 409 US 75, 34 L Ed 2d 290, 93 S Ct 259 (1972), id., at 76–77, 34 L Ed 2d 290 (Marshall, J., concurring), and the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior? "Many of these effects may be intangible and indistinct, but they are nonetheless real." American Power & Light Co., supra, at 103, 91 L Ed 103. Mr. Justice Cardozo said that all laws in Western civilization are "guided by a robust common sense . . . ." Steward Machine Co. v Davis, 301 US 548, 590, 81 L Ed 1279, 57 S Ct 883, 109 ALR 1293 (1937). The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.

[16, 17] It is argued that individual "free will" must govern, even in

activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that government cannot legitimately impede an individual's desire to see or acquire obscene plays, movies, and books. We do indeed base our society on

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certain assumptions that people have the capacity for free choice. Most exercises of individual free choice—those in politics, religion, and expression of ideas—are explicitly protected by the Constitution. Totally unlimited play for free will, however, is not allowed in our or any other society. We have just noted, for example, that neither the First Amendment nor "free will" precludes States from having "blue sky" laws to regulate what sellers of securities may write or publish about their wares. See supra, 61–62, 37 L Ed 2d 459. Such laws are to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition. Nor do modern societies leave disposal of garbage and sewage up to the individual "free will," but impose regulation to protect both public health and the appearance of public places. States are told by some that they must await a "laissez faire" market solution to the obscenity-pornography problem, paradoxically "by people who have never otherwise had a kind word to say for laissez-faire," particularly in solving urban, commercial, and environmental pollution problems. See I. Kristol, On the Democratic Idea in America 37 (1972).

[18, 19] The States, of course, may follow such a "laissez faire" policy and drop all controls on commercialized obscenity, if that is what they prefer, just as they can ignore consumer protection in the marketplace, but nothing in the Constitution *compels* the States to do so with regard to matters falling within state jurisdiction. See United States v Reidel, 402 US, at 357, 28 L Ed 2d 813; Memoirs v Massachusetts, 383 US, at 462, 16 L Ed 2d 1 (White, J., dissenting). "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." Griswold v Connecticut, 381 US 479, 482, 14 L Ed 2d 510, 85 S Ct 1678 (1965). See Ferguson v Skrupa, 372 US, at 731, 10 L Ed 2d 93, 95 ALR 2d 1347 (1963); Day-Brite Lighting, Inc. v Missouri, 342 US 421, 423, 96 L Ed 469, 72 S Ct 405 (1952).

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[20] It is asserted, however, that standards for evaluating state commercial regulations are inapposite in the present context, as state regulation of access by consenting adults to obscene material violates the constitutionally protected right to privacy enjoyed by petitioners' customers. Even assuming that petitioners have vicarious standing to assert potential customers' rights, it is unavailing to compare a theater, open to the public for a fee, with the private home of Stanley v Georgia, 394 US, at 568, 22 L Ed 2d 542, and the marital bedroom of Griswold v Connecticut, supra, at 485–486, 14 L Ed 2d 510. This Court, has, on numerous occasions, refused to hold that commercial ventures such as a motion-picture house are "private" for the purpose of civil rights litigation and civil rights statutes. See Sullivan v Little Hunting Park, Inc. 396 US 229, 236, 24 L Ed 2d 386, 90 S Ct 400 (1969); Daniel v Paul, 395 US 298, 305–308, 23 L Ed 2d

318, 89 S Ct 1697 (1969); Blow v North Carolina, 379 US 684, 685–686, 13 L Ed 2d 603, 85 S Ct 635 (1965); Hamm v Rock Hill, 379 US 306, 307–308, 13 L Ed 2d 300, 85 S Ct 384 (1964); Heart of Atlanta Motel, Inc. v United States, 379 US 241, 247, 260–261, 13 L Ed 2d 258, 85 S Ct 348 (1964). The Civil Rights Act of 1964 specifically defines motion-picture houses and theaters as places of "public accommodation" covered by the Act as operations affecting commerce. 78 Stat 243, 42 USC §§ 2000a(b)(3), (c) [42 USCS §§ 2000a(b)(3), (c)].

[21] Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' Palko v Connecticut, 302 US 319, 325 [82 L Ed 288, 58 S Ct 149] (1937)." Roe v Wade, 410 US 113, 152, 35 L Ed 2d 147, 93 S Ct 705 (1973). This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing. Cf. Eisenstadt v Baird, 405 US 438, 453–454, 31 L Ed 2d 349, 92 S Ct 1029 (1972); id., at 460, 463–465, 31 L Ed 2d 349 (White, J., concurring); Stanley v Georgia, supra, at 568, 22 L Ed 2d 542; Loving v Virginia, 388 US 1, 12, 18 L Ed 2d 1010, 87 S Ct 1817 (1967);

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Griswold v Connecticut, supra, at 486, 14 L Ed 2d 510; Prince v Massachusetts, 321 US 158, 166, 88 L Ed 645, 64 S Ct 438 (1944); Skinner v Oklahoma, 316 US 535, 541, 86 L Ed 1655, 62 S Ct 1110 (1942); Pierce v Society of Sisters, 268 US 510, 535, 69 L Ed 1070, 45 S Ct 571, 39 ALR 468 (1925); Meyer v Nebraska, 262 US 390, 399, 67 L Ed 1042, 43 S Ct 625, 29 ALR 1446 (1923). Nothing, however, in this Court's decisions intimates that there is any "fundamental" privacy right "implicit in the concept of ordered liberty" to watch obscene movies in places of public accommodation.

[22–25] If obscene material unprotected by the First Amendment in itself carried with it a "penumbra" of constitutionally protected privacy, this Court would not have found it necessary to decide Stanley on the narrow basis of the "privacy of the home," which was hardly more than a reaffirmation that "a man's home is his castle." Cf. Stanley v Georgia, supra, at 564, 22 L Ed 2d 542.[13] Moreover, we have declined to equate the privacy of the home relied on in Stanley with a "zone" of "privacy" that follows a distributor or a consumer of obscene materials wherever he goes. See United States v Orito, 413 US, at 141–143, 37 L Ed 2d at 517; United States v 12 200-Ft. Reels of Film, 413 US, at 126–129, 37 L Ed 2d at 505–506; United States v Thirty-seven Photographs, 402 US, at 376–377,

[23, 24] 13. The protection afforded by Stanley v Georgia, 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243 (1969), is restricted to a place, the home. In contrast, the constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved. Cf. Roe v Wade, 410 US 1135, 152–154, 35 L Ed 2d 147, 93 S Ct 705 (1973); Griswold v Connecticut, 381 US 479, 485–486, 14 L Ed 2d 510, 85 S Ct 1678 (1965). Obviously, there is no necessary or legitimate expectation of privacy which would extend to marital intercourse on a street corner or a theater stage.

28 L Ed 2d 822 (opinion of White, J.); United States v Reidel, supra, at 355, 28 L Ed 2d 813. The idea of a "privacy" right and a place of public accommodation are, in this context,

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mutually exclusive. Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a "live" theater stage, any more than a "live" performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue.

[26, 27] It is also argued that the State has no legitimate interest in "control [of] the moral content of a person's thoughts," Stanley v Georgia, supra, at 565, 22 L Ed 2d 542, and we need not quarrel with this. But we reject the claim that the State of Georgia is here attempting to control the minds or thoughts of those who patronize theaters. Preventing unlimited display or distribution of obscene material, which by definition lacks any serious literary, artistic, political, or scientific value as communication, Miller v California, 413 US, at 24, 34, 37 L Ed 2d at 431, 437, is distinct from a control of reason and the intellect. Cf. Kois v Wisconsin, 408 US 229, 33 L Ed 2d 312, 92 S Ct 2245, (1972); Roth v United States, supra, at 485–487, 1 L Ed 2d 1498; Thornhill v Alabama, 310 US 88, 101–102, 84 L Ed 1093, 60 S Ct 736 (1940); Finnis, "Reason and Passion": The Constitutional Dialetic of Free Speech and Obscenity, 116 U Pa L Rev 222, 229–230, 241–243 (1967). Where communication of ideas, protected by the First Amendment, is not involved, or the particular privacy of the home protected by Stanley, or any of the other "areas or zones" of constitutionally protected privacy, the mere fact that, as a consequence, some human "utterances" or "thoughts" may be incidentally affected does not bar the State from acting to protect legitimate state interests. Cf. Roth v United States, supra, at 483, 485–487, 1 L Ed 2d 1498; Beauharnais v Illinois, 343 US, at 256–257, 96 L Ed 919. The fantasies of a drug addict are his own and beyond the reach of government, but government regulation of drug sales is not

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prohibited by the Constitution. Cf. United States v Reidel, supra, at 359–360, 28 L Ed 2d 813 (Harlan, J., concurring).

[28, 29] Finally, petitioners argue that conduct which directly involves "consenting adults" only has, for that sole reason, a special claim to constitutional protection. Our Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation,[14] is a step we are unable to take.[15] Commercial exploitation of depictions,

14. Cf. J. Mill, On Liberty 13 (1955, ed).

15. The state statute books are replete with constitutionally unchallenged laws against prostitution, suicide, voluntary self-mutilation, brutalizing "bare fist" prize fights, and duels, although these crimes may only directly involve "consenting adults." Statutes making bigamy a crime surely cut into an individual's freedom to associate, but few today seriously

descriptions, or exhibitions of obscene conduct on commercial premises open to the adult public falls within a State's broad power to regulate commerce and protect the public

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environment. The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as "wrong" or "sinful." The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's words, the States' "right . . . to maintain a decent society." Jacobellis v Ohio, 378 US, at 199, 12 L Ed 2d 793 (dissenting opinion).

[8, 30] To summarize, we have today reaffirmed the basic holding of Roth v United States, supra, that obscene material has no protection under the First Amendment. See Miller v California, supra, and Kaplan v California, 413 US 115, 37 L Ed 2d 492, 93 S Ct 2680 (1973). We have directed our holdings, not at thoughts or speech, but at depiction and description of specifically defined sexual conduct that States may regulate within limits designed to prevent infringement of First Amendment rights. We have also reaffirmed the holdings of United States v Reidel, supra, and United States v Thirty-seven Photographs, supra, that commerce in obscene material is unprotected by any constitutional doctrine of privacy. United States v Orito, 413 US, at 141–143, 37 L Ed 2d at 517; United States v 12 200-Ft. Reels of Film, 413 US, at 126–129, 37 L Ed 2d at 505–506. In this case we hold that the States have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accommodation, including so-called "adult" theaters from which minors are excluded. In light of these holdings, nothing precludes the State of Georgia from the regulation of the allegedly obscene material exhibited in Paris Adult Theatre I or II, provided that the applicable Georgia law, as written or authoritatively interpreted by the Georgia courts, meets the First Amendment standards set forth in Miller v California, 413 US, at 23–25, 37 L Ed 2d at 431. The

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judgment is

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claim such statutes violate the First Amendment or any other constitutional provision. See Davis v Beason, 133 US 333, 344–345, 33 L Ed 637, 10 S Ct 299 (1890). Consider also the language of this Court in McLaughlin v Florida, 379 US 184, 196, 13 L Ed 2d 222, 85 S Ct 283 (1964), as to adultery; Southern Surety Co. v Oklahoma, 241 US 582, 586, 60 L Ed 1187, 36 S Ct 692 (1916), as to fornication; Hoke v United States, 227 US 308, 320–322, 57 L Ed 523, 33 S Ct 281 (1913), and Caminetti v United States, 242 US 470, 484–487, 491–492, 61 L Ed 442, 37 S Ct 192 (1917), as to "white slavery"; Murphy v California, 225 US 623, 629, 56 L Ed 1229, 32 S Ct 697 (1912), as to billiard halls; and the Lottery Case, 188 US 321, 355–356, 47 L Ed 492, 23 S Ct 321 (1903), as to gambling. See also the summary of state statutes prohibiting bear baiting, cockfighting, and other brutalizing animal "sports," in Stevens, Fighting and Baiting, in Animals and Their Legal Rights 112–127 (Leavitt ed 1970). As Professor Irving Kristol has observed: "Bear-baiting and cockfighting are prohibited only in part out of compassion for the suffering animals; the main reason they were abolished was because it was felt that they debased and brutalized the citizenry who flocked to witness such spectacles." On the Democratic Idea in America 33 (1972).

vacated and the case remanded to the Georgia Supreme Court for further proceedings not inconsistent with this opinion and Miller v California, supra. See United States v 12 200-Ft. Reels of Film, 413 US at 130 n 7, 37 L Ed 2d at 507.

Vacated and remanded.

SEPARATE OPINIONS

Mr. Justice **Douglas**, dissenting.

My Brother Brennan is to be commended for seeking a new path through the thicket which the Court entered when it undertook to sustain the constitutionality of obscenity laws and to place limits on their application. I have expressed on numerous occasions my disagreement with the basic decision that held that "obscenity" was not protected by the First Amendment. I disagreed also with the definitions that evolved. Art and literature reflect tastes; and tastes, like musical appreciation, are hardly reducible to precise definitions. That is one reason I have always felt that "obscenity" was not an exception to the First Amendment. For matters of taste, like matters of belief, turn on the idiosyncrasies of individuals. They are too personal to define and too emotional and vague to apply, as witness the prison term for Ralph Ginzburg, Ginzburg v United States, 383 US 463, 16 L Ed 2d 31, 86 S Ct 942, not for what he printed but for the sexy manner in which he advertised his creations.

The other reason I could not bring myself to conclude that "obscenity" was not covered by the First Amendment was that prior to the adoption of our Constitution and Bill of Rights the Colonies had no law excluding "obscenity" from the regime of freedom of expression and press that then existed. I could find no such laws; and more important, our leading colonial expert, Julius Goebel, could find none, J. Goebel, Development of Legal Institutions (1946); J. Goebel, Felony and Misdemeanor (1937). So I became convinced that the

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creation of the "obscenity" exception to the First Amendment was a legislative and judicial tour de force; that if we were to have such a regime of censorship and punishment, it should be done by constitutional amendment.

People are, of course, offended by many offerings made by merchants in this area. They are also offended by political pronouncements, sociological themes, and by stories of official misconduct. The list of activities and publications and pronouncements that offend someone is endless. Some of it goes on in private; some of it is inescapably public, as when a government official generates crime, becomes a blatant offender of the moral sensibilities of the people, engages in burglary, or breaches the privacy of the telephone, the conference room, or the home. Life in this crowded modern technological world creates many offensive statements and many offensive deeds. There is no protection against offensive ideas, only against offensive conduct.

"Obscenity" at most is the expression of offensive ideas. There are regimes in the world where ideas "offensive" to the majority (or at least to those who control the ma-

jority) are suppressed. There life proceeds at a monotonous pace. Most of us would find that world offensive. One of the most offensive experiences in my life was a visit to a nation where bookstalls were filled only with books on mathematics and books on religion.

I am sure I would find offensive most of the books and movies charged with being obscene. But in a life that has not been short, I have yet to be trapped into seeing or reading something that would offend me. I never read or see the materials coming to the Court under charges of "obscenity," because I have thought the First Amendment made it unconstitutional for me to act as a censor. I see ads in bookstores and neon lights over theaters that resemble bait for those who

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seek vicarious exhilaration. As a parent or a priest or as a teacher I would have no compunction in edging my children or wards away from the books and movies that did no more than excite man's base instincts. But I never supposed that government was permitted to sit in judgment on one's tastes or beliefs —save as they involved action within the reach of the police power of government.

I applaud the effort of my Brother Brennan to forsake the low road which the Court has followed in this field. The new regime he would inaugurate is much closer than the old to the policy of abstention which the First Amendment proclaims. But since we do not have here the unique series of problems raised by government-imposed or government-approved captive audiences, cf. Public Utilities Comm'n v Pollak, 343 US 451, 96 L Ed 1068, 72 S Ct 813, I see no constitutional basis for fashioning a rule that makes a publisher, producer, bookseller, librarian, or movie house criminally responsible, when he fails to take affirmative steps to protect the consumer against literature or books offensive* to those who temporarily occupy the seats of the mighty.

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When man was first in the jungle he took care of himself. When he entered a societal group, controls were necessarily imposed. But our society—unlike most in the world—

* What we do today is rather ominous as respects librarians. The net now designed by the Court is so finely meshed that, taken literally, it could result in raids on libraries. Libraries, I had always assumed, were sacrosanct, representing every part of the spectrum. If what is offensive to the most influential person or group in a community can be purged from a library, the library system would be destroyed.

A few States exempt librarians from laws curbing distribution of "obscene" literature. California's law, however, provides: "Every person who, with knowledge that a person is a minor, or who fails to exercise reasonable care in ascertaining the true age of a minor, knowingly distributes to or sends or causes to be sent to, or exhibits to, or offers to distribute or exhibit any harmful matter to a minor, is guilty of a misdemeanor." Calif Penal Code § 313.1.

A "minor" is one under 18 years of age; the word "distribute" means "to transfer possession"; "matter" includes "any book, magazine, newspaper, or other printed or written material." Id., §§ 313(b), (d), (g).

"Harmful matter" is defined in § 313 (a) to mean "matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance for minors."

presupposes that freedom and liberty are in a frame of reference that makes the individual, not government, the keeper of his tastes, beliefs, and ideas. That is the philosophy of the First Amendment; and it is the article of faith that sets us apart from most nations in the world.

Mr. Justice **Brennan**, with whom Mr. Justice **Stewart** and Mr. Justice **Marshall** join, dissenting.

This case requires the Court to confront once again the vexing problem of reconciling state efforts to suppress sexually oriented expression with the protections of the First Amendment, as applied to the States through the Fourteenth Amendment. No other aspect of the First Amendment has, in recent years, demanded so substantial a commitment of our time, generated such disharmony of views, and remained so resistant to the formulation of stable and manageable standards. I am convinced that the approach initiated 16 years ago in Roth v United States, 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304 (1957), and culminating in the Court's decision today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the

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time has come to make a significant departure from that approach.

In this civil action in the Superior Court of Fulton County, the State of Georgia sought to enjoin the showing of two motion pictures, It All Comes Out In The End, and Magic Mirror, at the Paris Adult Theatres (I and II) in Atlanta, Georgia. The State alleged that the films were obscene under the standards set forth in Georgia Code Ann § 26–2101.[1] The trial court denied injunctive relief, holding that even though the films could be considered obscene, their commercial presentation could not constitutionally be barred in the absence of proof that they were shown to minors or unconsenting adults. Reversing, the Supreme Court of Georgia found the films obscene, and held that the care taken to avoid exposure to minors and unconsenting adults was without constitutional significance.

I

The Paris Adult Theatres are two commercial cinemas, linked by a common box office and lobby, on Peachtree Street in Atlanta, Georgia. On December 28, 1970, investigators employed by the Criminal Court of Fulton County entered the theaters as paying customers and viewed each of the films which are the subject of this action. Thereafter, two separate complaints, one for

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each of the two films, were filed in the Superior Court seeking a declaration that the films were obscene and an injunction against their continued presentation to the public. The complaints alleged that the films were "a flagrant violation of Georgia Code Section 26–2101 in that the sole and dominant theme[s]

1. Ga Code Ann § 26–2101 provides in pertinent part that

"(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it."

of the said motion picture film[s] considered as a whole and applying contemporary community standards [appeal] to the prurient interest in sex, nudity and excretion, and that the said motion picture film[s are] utterly and absolutely without any redeeming social value whatsoever, and [transgress] beyond the customary limits of candor in describing and discussing sexual matters." App 20, 39.

Although the language of the complaints roughly tracked the language of § 26–2101, which imposes criminal penalties on persons who knowingly distribute obscene materials,[2] this proceeding was not brought pursuant to that statute. Instead, the State initiated a nonstatutory civil proceeding to determine the obscenity of the films and to enjoin their exhibition. While the parties waived jury trial and stipulated that the decision of the trial court would be final on the issue of obscenity, the State has not indicated whether it intends to bring a criminal action under the statute in the event that it succeeds in proving the films obscene.

Upon the filing of the complaints, the trial court scheduled a hearing for January 13, 1971, and entered an order temporarily restraining the defendants from concealing, destroying, altering, or removing the films

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from the jurisdiction, but not from exhibiting the films to the public pendente lite. In addition to viewing the films at the hearing, the trial court heard the testimony of witnesses and admitted into evidence photographs that were stipulated to depict accurately the facade of the theater. The witnesses testified that the exterior of the theater was adorned with prominent signs reading "Adults Only," "You Must Be 21 and Able to Prove It," and "If the Nude Body Offends You, Do Not Enter." Nothing on the outside of the theater described the films with specificity. Nor were pictures displayed on the outside of the theater to draw the attention of passersby to the contents of the films. The admission charge to the theater was $3. The trial court heard no evidence that minors had ever entered the theater, but also heard no evidence that petitioners had enforced a systematic policy of screening out minors (apart from the posting of the notices referred to above).

On the basis of the evidence submitted, the trial court concluded that the films could fairly be considered obscene, "[a]ssuming that obscenity is established by a finding that the actors cavorted about in the nude indiscriminately," but held, nonetheless, that "the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible."[3]

2. Ga Code § 26–2101(a):

"A person commits the offense of distributing obscene materials [as described in subsection (b), n 1, supra] when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do . . . ."

3. The precise holding of the trial court is not free from ambiguity. After pointing out that the films could be considered obscene, and that they still could not be suppressed in the absence of exposure to juveniles or unconsenting adults, the trial court concluded that "[i]t is the judgment of this court that the films, even though they display the human body and the human personality in a most degrading fashion, are not obscene." It is not clear

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Since the issue did not arise in a statutory proceeding, the trial court was not required to pass upon the constitutionality of any state statute, on its face or as applied, in denying the injunction sought by the State.

The Supreme Court of Georgia unanimously reversed, reasoning that the lower court's reliance on Stanley v Georgia, 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243 (1969), was misplaced in view of our subsequent decision in United States v Reidel, 402 US 351, 28 L Ed 2d 813, 91 S Ct 1410 (1971):

> "In [Reidel] the Supreme Court expressly held that the government could constitutionally prohibit the distribution of obscene materials through the mails, even though the distribution be limited to willing recipients who state that they are adults, and, further, that the constitutional right of a person to possess obscene material in the privacy of his own home, as expressed in the Stanley case, does not carry with it the right to sell and deliver such material. . . . Those who choose to pass through the front door of the defendant's theater and purchase a ticket to view the films and who certify thereby that they are more than 21 years of age are willing recipients of the material in the same legal sense as were those in the Reidel case, who, after reading the newspaper advertisements of the material, mailed an order to the defendant accepting his solicitation to sell them the obscene booklet there. That case clearly establishes once and for all that the sale and delivery of obscene material to willing adults is not

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> protected under the first amendment." 228 Ga 343, 346, 185 SE2d 768, 769–770 (1971).

The decision of the Georgia Supreme Court rested squarely on its conclusion that the State could constitutionally suppress these films even if they were displayed only to persons over the age of 21 who were aware of the nature of their contents and who had consented to viewing them. For the reasons set forth in this opinion, I am convinced of the invalidity of that conclusion of law, and I would therefore vacate the judgment of the Georgia Supreme Court. I have no occasion to consider the extent of state power to regulate the distribution of sexually oriented materials to juveniles or to unconsenting adults. Nor am I required, for the purposes of this review, to consider whether or not these petitioners had, in fact, taken precautions to avoid exposure of films to minors or unconsenting adults.

II

In Roth v United States, 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304 (1957), the Court held that obscenity, although expression, falls outside the area of speech or press con-

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whether the trial court found that the films were not obscene in the sense that they were protected expression under the standards of Roth v United States, 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304 (1957), and Redrup v New York, 386 US 767, 18 L Ed 2d 515, 87 S Ct 1414 (1967), or whether it used the expression "not obscene" as a term of art to indicate that the films could not be suppressed even though they were not protected under the Roth-Redrup standards. In any case, the Georgia Supreme Court viewed the trial court's opinion as holding that the films could not be suppressed, even if they were unprotected expression, provided that they were not exhibited to juveniles or unconsenting adults.

stitutionally protected under the First and Fourteenth Amendments against state or federal infringement. But at the same time we emphasized in Roth that "sex and obscenity are not synonymous," id., at 487, 1 L Ed 2d 1498, and that matter which is sexually oriented but not obscene is fully protected by the Constitution. For we recognized that "[s]ex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." Ibid.[4] Roth rested, in

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other words, on what has been termed a two-level approach to the question of obscenity.[5] While much criticized,[6] that approach has been endorsed by all but two members of this Court who have addressed the question since Roth. Yet our efforts to implement that approach demonstrate that agreement on the existence of something called "obscenity" is still a long and painful step from agreement on a workable definition of the term.

Recognizing that "the freedoms of expression . . . are vulnerable to gravely damaging yet barely visible encroachments," Bantam Books, Inc. v Sullivan, 372 US 58, 66, 9 L Ed 2d 584, 83 S Ct 631 (1963), we have demanded that "sensitive tools" be used to carry out the "separation of legitimate from illegitimate speech." Speiser v Randall, 357 US 513, 525, 2 L Ed 2d 1460, 78 S Ct 1332 (1958). The essence of our problem in the obscenity area is that we have been unable to provide "sensitive tools" to separate obscenity from other sexually oriented but constitutionally protected speech,

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so that efforts to suppress the former do not spill over into the suppression of the latter. The attempt, as the late Mr. Justice Harlan observed, has only "produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." Interstate Circuit, Inc. v Dallas, 390 US 676, 704–705, 20 L Ed 2d 225, 88 S Ct 1298 (1968) (separate opinion).

To be sure, five members of the Court did agree in Roth that obscenity could be determined by asking "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole ap-

4. "As to all such problems, this Court said in Thornhill v Alabama, 310 US 88, 101–102, 84 L Ed 1093, 60 S Ct 736 (1940):

" 'The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for *information and education with respect to the significant issues of the times*. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace *all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.*' (Emphasis added.)" Roth, 354 US, at 487–488, 1 L Ed 2d 1498.

See also, e. g., Thomas v Collins, 323 US 516, 531, 89 L Ed 430, 65 S Ct 315 (1945) ("the rights of free speech and a free press are not confined to any field of human interest").

5. See, e. g., Kalven, The Metaphysics of the Law of Obscenity, 1960 Sup Ct Rev 1, 10–11; cf. Beauharnais v Illinois, 343 US 250, 96 L Ed 919, 72 S Ct 725 (1952).

6. See, e. g., T. Emerson, The System of Freedom of Expression 487 (1970); Kalven, supra, n 5; Comment, More Ado About Dirty Books, 75 Yale L J 1364 (1966).

peals to prurient interest." 354 US, at 489, 1 L Ed 2d 1498. But agreement on that test—achieved in the abstract and without reference to the particular material before the Court, see id., at 481 n 8—1 L Ed 2d 1498, was, to say the least, short lived. By 1967 the following views had emerged: Mr. Justice Black and Mr. Justice Douglas consistently maintained that government is wholly powerless to regulate any sexually oriented matter on the ground of its obscenity. See, e. g., Ginzburg v United States, 383 US 463, 476, 482, 16 L Ed 2d 31, 86 S Ct 942 (1966) (dissenting opinions); Jacobellis v Ohio, 378 US 184, 196, 12 L Ed 2d 793, 84 S Ct 1676 (1964) (concurring opinion); Roth v United States, supra, at 508, 1 L Ed 2d 1498 (dissenting opinion). Mr. Justice Harlan, on the other hand, believed that the Federal Government in the exercise of its enumerated powers could control the distribution of "hard core" pornography, while the States were afforded more latitude to "[ban] any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material." Jacobellis v Ohio, supra, at 204, 1 L Ed 2d 793 (dissenting opinion). See also, e. g., Ginzburg v United States, supra, at 493, 16 L Ed 2d 31 (dissenting opinion); A Quantity of Books v Kansas, 378 US 205, 215, 12 L Ed 2d 809, 84 S Ct 1723 (1964) (dissenting opinion joined by Clark, J.); Roth, supra, at 496, 1 L Ed 2d 1498

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(separate opinion). Mr. Justice Stewart regarded "hard core" pornography as the limit of both federal and state power. See, e. g., Ginzburg v United States, supra, at 497, 16 L Ed 2d 31 (dissenting opinion); Jacobellis v Ohio, supra, at 197, 12 L Ed 2d 793 (concurring opinion).

The view that, until today, enjoyed the most, but not majority, support was an interpretation of Roth (and not, as the Court suggests, a veering "sharply away from the Roth concept" and the articulation of "a new test of obscenity," Miller v California, 413 US, at 21, 37 L Ed 2d at 429) adopted by Mr. Chief Justice Warren, Mr. Justice Fortas, and the author of this opinion in Memoirs v Massachusetts, 383 US 413, 16 L Ed 2d 1, 86 S Ct 975 (1966). We expressed the view that Federal or State Governments could control the distribution of material where "three elements . . . coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." Id., at 418, 16 L Ed 2d 1. Even this formulation, however, concealed differences of opinion. Compare Jacobellis v Ohio, supra, at 192–195, 12 L Ed 2d 793 (Brennan, J., joined by Goldberg, J.) (community standards national), with id., at 200–201, 12 L Ed 2d 793 (Warren, C. J., joined by Clark, J., dissenting) (community standards local).[7] Moreover, it did not

7. On the question of community standards see also Hoyt v Minnesota, 399 US 524, 26 L Ed 2d 782, 90 S Ct 2241 (1970) (Blackmun, J., joined by Burger, C. J., and Harlan, J., dissenting) (flexibility for state standards); Cain v Kentucky, 397 US 319, 25 L Ed 2d 334, 90 S Ct 1110 (1970) (Burger, C. J., dissenting) (same); Manual Enterprises v Day, 370 US 478, 488, 8 L Ed 2d 639, 82 S Ct 1432 (1962) (Harlan, J., joined by Stewart, J.) (national standards in context of federal prosecution).

provide a definition covering all situations. See Mishkin v New York, 383 US 502, 16 L Ed 2d 56, 86 S Ct 958 (1966)

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(prurient appeal defined in terms of a deviant sexual group); Ginzburg v United States, supra ("pandering" probative evidence of obscenity in close cases). See also Ginsberg v New York, 390 US 629, 20 L Ed 2d 195, 88 S Ct 1274 (1968) (obscenity for juveniles). Nor, finally, did it ever command a majority of the Court. Aside from the other views described above, Mr. Justice Clark believed that "social importance" could only "be considered together with evidence that the material in question appeals to prurient interest and is patently offensive." Memoirs v Massachusetts, supra, at 445, 16 L Ed 2d 1 (dissenting opinion). Similarly, Mr. Justice White regarded "a publication to be obscene if its predominant theme appeals to the prurient interest in a manner exceeding customary limits of candor," id., at 460–461, 16 L Ed 2d 1 (dissenting opinion), and regarded " 'social importance' . . . not [as] an independent test of obscenity but [as] relevant only to determining the predominant prurient interest of the material . . . ." Id., at 462, 16 L Ed 2d 1.

In the face of this divergence of opinion the Court began the practice in 1967 in Redrup v New York, 386 US 767, 18 L Ed 2d 515, 87 S Ct 1414 (1967), of per curiam reversals of convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, deemed not to be obscene.[8] This approach capped the attempt in

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Roth to separate all forms of sexually oriented expression into two categories—the one subject to full governmental suppression and the other beyond the reach of governmental regulation to the same extent as any other protected form of speech or press. Today a majority of the Court offers a slightly altered formulation of the basic Roth test, while leaving entirely unchanged the underlying approach.

8. No fewer than 31 cases have been disposed of in this fashion. Aside from the three cases reversed in Redrup, they are: Keney v New York, 388 US 440, 18 L Ed 2d 1302, 87 S Ct 2091 (1967); Friedman v New York, 388 US 441, 18 L Ed 2d 1303, 87 S Ct 2091 (1967); Ratner v California, 388 US 442, 18 L Ed 2d 1304, 87 S Ct 2092 (1967); Cobert v New York, 388 US 443, 18 L Ed 2d 1305, 87 S Ct 2092 (1967); Sheperd v New York, 388 US 444, 18 L Ed 2d 1306, 87 S Ct 2093 (1967); Avansino v New York, 388 US 446, 18 L Ed 2d 1308, 87 S Ct 2093 (1967); Aday v New York, 388 US 447, 18 L Ed 2d 1309, 87 S Ct 2095 (1967); Books, Inc. v United States, 388 US 449, 18 L Ed 2d 1311, 87 S Ct 2098 (1967); A Quantity of Books v Kansas, 388 US 452, 18 L Ed 2d 1314, 87 S Ct 2104 (1967); Mazes v Ohio, 388 US 453, 18 L Ed 2d 1315, 87 S Ct 2105 (1967); Schackman v California, 388 US 454, 18 L Ed 2d 1316, 87 S Ct 2107 (1967); Potomac News Co. v United States, 389 US 47, 19 L Ed 2d 46, 88 S Ct 233 (1967); Conner v City of Hammond, 389 US 48, 19 L Ed 2d 47, 88 S Ct 234 (1967); Central Magazine Sales, Ltd. v United States, 389 US 50, 19 L Ed 2d 49, 88 S Ct 235 (1967); Chance v California, 389 US 89, 19 L Ed 2d 256, 88 S Ct 253 (1967); I. M. Amusement Corp. v Ohio, 389 US 573, 19 L Ed 2d 776, 88 S Ct 690 (1968); Robert-Arthur Management Corp. v Tennessee, 389 US 578, 19 L Ed 2d 777, 88 S Ct 691 (1968); Felton v City of Pensacola, 390 US 340, 19 L Ed 2d 1220, 88 S Ct 1098 (1968); Henry v Louisiana, 392 US 655, 20 L Ed 2d 1343, 88 S Ct 2274 (1968); Cain v Kentucky, supra; Bloss v Dykema, 398 US 278, 26 L Ed 2d 230, 90 S Ct 1727 (1970); Walker v Ohio, 398 US 434, 26 L Ed 2d 385, 90 S Ct 1884 (1970); Hoyt v Minnesota, supra; Childs v Oregon, 401 US 1006, 28 L Ed 2d 542, 91 S Ct 1248 (1971); Bloss v Michigan, 402 US 938, 29 L Ed 2d 106, 91 S Ct 1615 (1971); Burgin v South Carolina, 404 US 806, 30 L Ed 2d 39, 92 S Ct 46 (1971); Hartstein v Missouri, 404 US 988, 30 L Ed 2d 539, 92 S Ct 531 (1971); Weiner v California, 404 US 988, 30 L Ed 2d 539, 92 S Ct 534 (1971).

III

Our experience with the Roth approach has certainly taught us that the outright suppression of obscenity cannot be reconciled with the fundamental principles of the First and Fourteenth Amendments. For we have failed to formulate a standard that sharply distinguishes protected from unprotected speech, and out of necessity, we have resorted to the Redrup approach, which resolves cases as between the parties, but offers only the most obscure guidance to legislation, adjudication by other courts, and primary conduct. By disposing of cases through summary reversal or denial of certiorari we have deliberately and effectively obscured the rationale underlying the decisions. It comes as no surprise that judicial attempts to follow our lead conscientiously have often ended in hopeless confusion.

Of course, the vagueness problem would be largely of our own creation if it stemmed primarily from our

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failure to reach a consensus on any one standard. But after 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials. Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as "prurient interest," "patent offensiveness," "serious literary value," and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them. Although we have assumed that obscenity does exist and that we "know it when [we] see it," Jacobellis v Ohio, supra, at 197, 12 L Ed 2d 793 (Stewart, J., concurring), we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.

We have more than once previously acknowledged that "constitutionally protected expression . . . is often separated from obscenity only by a dim and uncertain line." Bantam Books, Inc. v Sullivan, 372 US, at 66, 9 L Ed 2d 584. See also, e. g., Mishkin v New York, supra, at 511, 16 L Ed 2d 56. Added to the "perhaps inherent residual vagueness" of each of the current multitude of standards, Ginzburg v United States, supra, at 475 n 19, 16 L Ed 2d 31, is the further complication that the obscenity of any particular item may depend upon nuances of presentation and the context of its dissemination. See ibid. Redrup itself suggested that obtrusive exposure to unwilling individuals, distribution to juveniles, and "pandering" may also bear upon the determination of

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obscenity. See Redrup v New York, supra, at 769, 18 L Ed 2d 515. As Mr. Chief Justice Warren stated in a related vein, obscenity is a function of the circumstances of its dissemination:

> "It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of

course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character." Roth, 354 US, at 495, 1 L Ed 2d 1498 (concurring opinion). See also, e. g., Jacobellis v Ohio, supra, at 201, 12 L Ed 2d 793 (dissenting opinion); Kingsley Books, Inc. v Brown, 354 US 436, 445–446, 1 L Ed 2d 1469, 77 S Ct 1325 (1957) (dissenting opinion). I need hardly point out that the factors which must be taken into account are judgmental and can only be applied on "a case-by-case, sight-by-sight" basis. Mishkin v New York, supra, at 516, 16 L Ed 2d 56 (Black, J., dissenting). These considerations suggest that no one definition, no matter how precisely or narrowly drawn, can possibly suffice for all situations, or carve out fully suppressible expression from all media without also creating a substantial risk of encroachment upon the guarantees of the Due Process Clause and the First Amendment.[9]

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The vagueness of the standards in the obscenity area produces a number of separate problems, and any improvement must rest on an understanding that the problems are to some extent distinct. First, a vague statute fails to provide adequate notice to persons who are engaged in the type of conduct that the statute could be thought to proscribe. The Due Process Clause of the Fourteenth Amendment requires that all criminal laws provide fair notice of "what the State commands or forbids." Lanzetta v New Jersey, 306 US 451, 453, 83 L Ed 888, 59 S Ct 618 (1939); Connally v General Construction Co., 269 US 385, 70 L Ed 322, 46 S Ct 126 (1926). In the

9. Although I did not join the opinion of the Court in Stanley v Georgia, 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243 (1969), I am now inclined to agree that "the Constitution protects the right to receive information and ideas," and that "[t]his right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society." Id., at 564, 22 L Ed 2d 542. See Martin v City of Struthers, 319 US 141, 143, 87 L Ed 1313, 63 S Ct 862 (1943); Winters v New York, 333 US 507, 510, 92 L Ed 840, 68 S Ct 665 (1948); Lamont v Postmaster General, 381 US 301, 307–308, 14 L Ed 2d 398, 85 S Ct 1493 (1965) (concurring opinion). This right is closely tied, as Stanley recognized, to "the right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy." 394 US, at 564, 22 L Ed 2d 542. See Griswold v Connecticut, 381 US 479, 14 L Ed 2d 510, 85 S Ct 1678 (1965); Olmstead v United States, 277 US 438, 478, 72 L Ed 944, 48 S Ct 564, 66 ALR 376 (1928) (Brandeis, J., dissenting). It is similarly related to "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child," (italics omitted) Eisenstadt v Baird, 405 US 438, 453, 31 L Ed 2d 349, 92 S Ct 1029 (1972), and the right to exercise "autonomous control over the development and expression of one's intellect, interests, tastes, and personality." (Italics omitted.) Doe v Bolton, 410 US 179, 211, 35 L Ed 2d 201, 93 S Ct 739 (1973) (Douglas, J., concurring). It seems to me that the recognition of these intertwining rights calls in question the validity of the two-level approach recognized in Roth. After all, if a person has the right to receive information without regard to its social worth—that is, without regard to its obscenity—then it would seem to follow that a State could not constitutionally punish one who undertakes to provide this information to a *willing, adult recipient*. See Eisenstadt v Baird, supra, at 443–446, 31 L Ed 2d 349. In any event, I need not rely on this line of analysis or explore all of its possible ramifications, for there is available a narrower basis on which to rest this decision. Whether or not a class of "obscene" and thus entirely unprotected speech does exist, I am forced to conclude that the class is incapable of definition with sufficient clarity to withstand attack on vagueness grounds. Accordingly, it is on principles of the void-for-vagueness doctrine that this opinion exclusively relies.

service of this general principle we have repeatedly held that the definition of obscenity must provide adequate notice of exactly what

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is prohibited from dissemination. See, e. g., Rabe v Washington, 405 US 313, 31 L Ed 2d 258, 92 S Ct 993 (1972); Interstate Circuit, Inc. v Dallas, 390 US 676, 20 L Ed 2d 225, 88 S Ct 1298 (1968); Winters v New York, 333 US 507, 92 L Ed 840, 68 S Ct 665 (1948). While various tests have been upheld under the Due Process Clause, see Ginsberg v New York, 390 US, at 643, 20 L Ed 2d 195; Mishkin v New York, supra, at 506–507, 16 L Ed 2d 56; Roth v United States, supra, at 491–492, 1 L Ed 2d 1498, I have grave doubts that any of those tests could be sustained today. For I know of no satisfactory answer to the assertion by Mr. Justice Black, "after the fourteen separate opinions handed down" in the trilogy of cases decided in 1966, that "no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of 'obscenity' . . . ." Ginzburg v United States, supra, at 480–481, 16 L Ed 2d 31 (dissenting opinion). See also the statement of Mr. Justice Harlan in Interstate Circuit, Inc. v Dallas, supra, at 707, 20 L Ed 2d 225 (separate opinion). As Mr. Chief Justice Warren pointed out, "[t]he constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." United States v Harriss, 347 US 612, 617, 98 L Ed 989, 74 S Ct 808 (1954). In this context, even the most painstaking efforts to determine in advance whether certain sexually oriented expression is obscene must inevitably prove unavailing. For the insufficiency of the notice compels persons to guess not only whether their conduct is covered by a criminal statute, but also whether their conduct falls within the constitutionally permissible reach of the statute. The resulting level of uncertainty is utterly intolerable, not alone because it makes

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"[b]ookselling . . . a hazardous profession," Ginsberg v New York, supra, at 674, 20 L Ed 2d 195 (Fortas, J., dissenting), but as well because it invites arbitrary and erratic enforcement of the law. See, e. g., Papachristou v City of Jacksonville, 405 US 156, 31 L Ed 2d 110, 92 S Ct 839 (1972); Gregory v City of Chicago, 394 US 111, 120, 22 L Ed 2d 134, 89 S Ct 946 (1969) (Black, J., concurring); Niemotko v Maryland, 340 US 268, 95 L Ed 267, 71 S Ct 325 (1951); Cantwell v Connecticut, 310 US 296, 308, 84 L Ed 1213, 60 S Ct 900, 128 ALR 1352 (1940); Thornhill v Alabama, 310 US 88, 84 L Ed 1093, 60 S Ct 736 (1940).

In addition to problems that arise when any criminal statute fails to afford fair notice of what it forbids, a vague statute in the areas of speech and press creates a second level of difficulty. We have indicated that "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on

10. In this regard, the problems of vagueness and overbreadth are, plainly, closely intertwined. See NAACP v Button, 371 US 415, 432–433, 9 L Ed 2d 405, 83 S Ct 328 (1963); Note, The First Amendment Overbreadth Doctrine, 83 Harv L Rev 844, 845 (1970). Cf. infra, at 93–94, 37 L Ed 2d at 478, 479.

speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."[10] Smith v California, 361 US 147, 151, 4 L Ed 2d 205, 80 S Ct 215 (1959). That proposition draws its strength from our recognition that

> "[t]he fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar . . . ." Roth, supra, at 488, 1 L Ed 2d 1498.[11]

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To implement this general principle, and recognizing the inherent vagueness of any definition of obscenity, we have held that the definition of obscenity must be drawn as narrowly as possible so as to minimize the interference with protected expression. Thus, in Roth we rejected the test of Regina v Hicklin, [1868] LR 3 QB 360, that "[judged] obscenity by the effect of isolated passages upon the most susceptible persons." 354 US, at 489, 1 L Ed 2d 1498. That test, we held in Roth, "might well encompass material legitimately treating with sex . . . ." Ibid. Cf. Mishkin v New York, supra, at 509, 16 L Ed 2d 56. And we have supplemented the Roth standard with additional tests in an effort to hold in check the corrosive effect of vagueness on the guarantees of the First Amendment.[12] We have held, for example, that "a State is not free to adopt whatever procedures it pleases

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for dealing with obscenity . . . ." Marcus v Search Warrant, 367 US 717, 731, 6 L Ed 2d 1127, 81 S Ct 1708 (1961). "Rather, the First Amendment requires that procedures be incorporated that 'ensure against the curtailment of constitutionally protected expression . . . .'" Blount v Rizzi, 400 US 410, 416, 27 L Ed 2d 498, 91 S Ct 423 (1971), quoting from Bantam Books, Inc. v Sullivan, 372 US, at 66, 9 L Ed 2d 584. See generally Rizzi, supra, at 417, 27 L Ed 2d 498; United States v Thirty-seven Photographs, 402 US 363, 367–375, 28 L Ed

11. See also Speiser v Randall, 357 US 513, 2 L Ed 2d 1460, 78 S Ct 1332 (1958); cf. Barenblatt v United States, 360 US 109, 137–138, 3 L Ed 2d 1115, 79 S Ct 1081 (1959) (Black, J., dissenting):
"This Court . . . has emphasized that the 'vice of vagueness' is especially pernicious where legislative power over an area involving speech, press, petition and assembly is involved. . . . For a statute broad enough to support infringement of speech, writings, thoughts and public assemblies, against the unequivocal command of the First Amendment necessarily leaves all persons to guess just what the law really means to cover, and fear of a wrong guess inevitably leads people to forego the very rights the Constitution sought to protect above all others. Vagueness becomes even more intolerable in this area if one accepts, as the Court today does, a balancing test to decide if First Amendment rights shall be protected. It is difficult at best to make a man guess—at the penalty of imprisonment—whether a court will consider the State's need for certain information superior to society's interest in unfettered freedom. It is unconscionable to make him choose between the right to keep silent and the need to speak when the statute supposedly establishing the 'state's interest' is too vague to give him guidance." (Citations omitted.)

12. Note, The First Amendment Overbreadth Doctrine, 83 Harv L Rev 844, 885–886 and n 158 (1970). ("Thus in the area of obscenity the overbreadth doctrine operates interstitially, when no line of privilege is apposite or yet to be found, to control the impact of schemes designed to curb distribution of unprotected material")

2d 822, 91 S Ct 1400 (1971); Lee Art Theatre, Inc. v Virginia, 392 US 636, 20 L Ed 2d 1313, 88 S Ct 2103 (1968); Freedman v Maryland, 380 US 51, 58–60, 13 L Ed 2d 649, 85 S Ct 734 (1965); A Quantity of Books v Kansas, 378 US 205, 12 L Ed 2d 809, 84 S Ct 1723 (1964) (plurality opinion).

Similarly, we have held that a State cannot impose criminal sanctions for the possession of obscene material absent proof that the possessor had knowledge of the contents of the material. Smith v California, supra. "Proof of scienter" is necessary "to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." Mishkin v New York, supra, at 511, 16 L Ed 2d 56; Ginsberg v New York, supra, at 644–645, 20 L Ed 2d 195. In short,

> "[t]he objectionable quality of vagueness and overbreadth . . . [is] the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. Cf. Marcus v Search Warrant, 367 US 717, 733, [6 L Ed 2d 1127, 81 S Ct 1708]. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Cf. Smith v California, [361 US], at 151–154, [4 L Ed 2d 205]; Speiser v Randall, 357 US 513, 526, [2 L Ed 2d 1460, 78 S Ct 1332]. Because First Amendment freedoms need breathing space to survive, government
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> [413 US 91]
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> may regulate in the area only with narrow specificity. Cantwell v Connecticut, 310 US 296, 311, [84 L Ed 1213, 60 S Ct 900, 128 ALR 1352]." NAACP v Button, 371 US 415, 432–433, 9 L Ed 2d 405, 83 S Ct 328 (1963).

The problems of fair notice and chilling protected speech are very grave standing alone. But it does not detract from their importance to recognize that a vague statute in this area creates a third, although admittedly more subtle, set of problems. These problems concern the institutional stress that inevitably results where the line separating protected from unprotected speech is excessively vague. In Roth we conceded that "there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls . . . ." 354 US, at 491–492, 1 L Ed 2d 1498. Our subsequent experience demonstrates that almost every case is "marginal." And since the "margin" marks the point of separation between protected and unprotected speech, we are left with a system in which almost every obscenity case presents a constitutional question of exceptional difficulty. "The suppression of a particular writing or other tangible form of expression is . . . an *individual* matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppressable within constitutional standards." Roth, supra, at 497, 1 L Ed 2d 1498 (separate opinion of Harlan, J.).

Examining the rationale, both explicit and implicit, of our vagueness decisions, one commentator has viewed these decisions as an attempt by the Court to establish an "insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms." Note, The Void-for-Vagueness Doc-

trine in the Supreme Court, 109 U Pa L Rev 67, 75 (1960). The buffer zone enables the Court to fend off legislative attempts

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"to pass to the courts—and ultimately to the Supreme Court—the awesome task of making case by case at once the criminal and the constitutional law." Id., at 81. Thus,

> "[b]ecause of the Court's limited power to reexamine fact on a cold record, what appears to be going on in the administration of the law must be forced, by restrictive procedures, to reflect what is really going on; and because of the impossibility, through sheer volume of cases, of the Court's effectively policing law administration case by case, those procedures must be framed to assure, as well as procedures can assure, a certain overall *probability* of regularity." Id., at 89 (emphasis in original).

As a result of our failure to define standards with predictable application to any given piece of material, there is no probability of regularity in obscenity decisions by state and lower federal courts. That is not to say that these courts have performed badly in this area or paid insufficient attention to the principles we have established. The problem is, rather, that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so. The number of obscenity cases on our docket gives ample testimony to the burden that has been placed upon this Court.

But the sheer number of the cases does not define the full extent of the institutional problem. For, quite apart from the number of cases involved and the need to make a fresh constitutional determination in each case, we are tied to the "absurd business of perusing and viewing the miserable stuff that pours into the Court . . . ." Interstate Circuit, Inc. v Dallas, 390 US, at 707, 20 L Ed 2d 225 (separate opinion of Harlan, J.). While the material may have varying degrees of social importance,

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it is hardly a source of edification to the members of this Court who are compelled to view it before passing on its obscenity. Cf. Mishkin v New York, supra, at 516–517, 16 L Ed 2d 56 (Black, J., dissenting).

Moreover, we have managed the burden of deciding scores of obscenity cases by relying on per curiam reversals or denials of certiorari—a practice which conceals the rationale of decision and gives at least the appearance of arbitrary action by this Court. See Bloss v Dykema, 398 US 278, 26 L Ed 2d 230, 90 S Ct 1727 (1970) (Harlan, J., dissenting). More important, no less than the procedural schemes struck down in such cases as Blount v Rizzi, supra, and Freedman v Maryland, supra, the practice effectively censors protected expression by leaving lower court determinations of obscenity intact even though the status of the allegedly obscene material is entirely unsettled until final review here. In addition, the uncertainty of the standards creates a continuing source of tension between state and federal courts, since the need for an independent determination by this Court seems to render superfluous even the most conscientious analysis

by state tribunals. And our inability to justify our decisions with a persuasive rationale—or indeed, any rationale at all—necessarily creates the impression that we are merely second-guessing state court judges.

The severe problems arising from the lack of fair notice, from the chill on protected expression, and from the stress imposed on the state and federal judicial machinery persuade me that a significant change in direction is urgently required. I turn, therefore, to the alternatives that are now open.

IV

1. The approach requiring the smallest deviation from our present course would be to draw a new line between protected and unprotected speech, still permitting

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the States to suppress all material on the unprotected side of the line. In my view, clarity cannot be obtained pursuant to this approach except by drawing a line that resolves all doubt in favor of state power and against the guarantees of the First Amendment. We could hold, for example, that any depiction or description of human sexual organs, irrespective of the manner or purpose of the portrayal, is outside the protection of the First Amendment and therefore open to suppression by the States. That formula would, no doubt, offer much fairer notice of the reach of any state statute drawn at the boundary of the State's constitutional power. And it would also, in all likelihood, give rise to a substantial probability of regularity in most judicial determinations under the standard. But such a standard would be appallingly overbroad, permitting the suppression of a vast range of literary, scientific, and artistic masterpieces. Neither the First Amendment nor any free community could possibly tolerate such a standard. Yet short of that extreme it is hard to see how any choice of words could reduce the vagueness problem to tolerable proportions, so long as we remain committed to the view that some class of materials is subject to outright suppression by the State.

2. The alternative adopted by the Court today recognizes that a prohibition against any depiction or description of human sexual organs could not be reconciled with the guarantees of the First Amendment. But the Court does retain the view that certain sexually oriented material can be considered obscene and therefore unprotected by the First and Fourteenth Amendments. To describe that unprotected class of expression, the Court adopts a restatement of the Roth-Memoirs definition of obscenity: "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the

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work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Miller v California, at 24, 37 L Ed 2d at 431. In apparent illustration of "sexual conduct," as that term is used in the test's second element, the Court identifies "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "(b) Patently offensive representations or descriptions of mas-

turbation, excretory functions, and lewd exhibition of the genitals." Id., at 25, 37 L Ed 2d at 431.

The differences between this formulation and the three-pronged Memoirs test are, for the most part, academic.[13] The first element of the Court's test is virtually identical to the Memoirs requirement that "the dominant theme of the material taken as a whole [must appeal] to a prurient interest in sex." 383 US, at 418, 16 L Ed 2d 1. Whereas the second prong of the Memoirs test demanded that the material be

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"patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters," ibid., the test adopted today requires that the material describe, "in a patently offensive way, sexual conduct specifically defined by the applicable state law." Miller v California, 413 US, at 24, 37 L Ed 2d at 430. The third component of the Memoirs test is that the material must be "utterly without redeeming social value." 383 US, at 418, 16 L Ed 2d 1. The Court's rephrasing requires that the work, taken as a whole, must be proved to lack "serious literary, artistic, political, or scientific value." Miller, 413 US, at 24, 37 L Ed 2d at 430.

The Court evidently recognizes that difficulties with the Roth approach necessitate a significant change of direction. But the Court does not describe its understanding of those difficulties, nor does it indicate how the restatement of the Memoirs test is in any way responsive to the problems that have arisen. In my view, the restatement leaves unresolved the very difficulties that compel our rejection of the underlying Roth approach, while at the same time contributing substantial difficulties of its own. The modification of the Memoirs test may prove sufficient to jeopardize the analytic underpinnings of the entire scheme. And today's restatement will likely have the effect, whether or not intended, of permitting far more sweeping suppression of sexually oriented expression, including expression that would almost surely be held protected under our current formulation.

Although the Court's restatement substantially tracks the three-part test announced in Memoirs v Massachusetts, supra, it does purport to modify the "social value" component of the test. Instead of requiring, as did Roth and Memoirs, that state suppression be limited to materials utterly lacking in social value, the Court today

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permits suppression if the government can prove that the materials lack *"serious* literary, artistic, political or scientific value." But the definition of "obscenity" as expression utterly lacking in social importance is the key to the conceptual basis of Roth and our sub-

13. While the Court's modification of the Memoirs test is small, it should still prove sufficient to invalidate virtually every state law relating to the suppression of obscenity. For, under the Court's restatement, a statute must specifically enumerate certain forms of sexual conduct, the depiction of which is to be prohibited. It seems highly doubtful to me that state courts will be able to construe state statutes so as to incorporate a carefully itemized list of various forms of sexual conduct, and thus to bring them into conformity with the Court's requirements. Cf. Blount v Rizzi, 400 US 410, 419, 27 L Ed 2d 498, 91 S Ct 423 (1971). The statutes of at least one State should, however, escape the wholesale invalidation. Oregon has recently revised its statute to prohibit only the distribution of obscene materials to juveniles or unconsenting adults. The enactment of this principle is, of course, a choice constitutionally open to every State, even under the Court's decision. See Oregon Laws 1971, c 743, Art 29, §§ 255–262.

sequent opinions. In Roth we held that certain expression is obscene, and thus outside the protection of the First Amendment, precisely *because* it lacks even the slightest redeeming social value. See Roth v United States, supra, at 484–485, 1 L Ed 2d 1498;[14] Jacobellis v Ohio, 378 US, at 191, 12 L Ed 2d 793; Zeitlin v Arnebergh, 59 Cal 2d 901, 920, 383 P2d 152, 165; cf. New York Times Co. v Sullivan, 376 US 254, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412 (1964); Garrison v Louisiana, 379 US 64, 75, 13 L Ed 2d 125, 85 S Ct 209 (1964); Chaplinsky v New Hampshire, 315 US 568, 572, 86 L Ed 1031, 62 S Ct 766 (1942); Kalven, The Metaphysics of the Law of Obscenity, 1960 Sup Ct Rev 1. The Court's approach necessarily assumes that some works will be deemed obscene—even though they clearly have *some* social value—because the State was able to prove that the value, measured by some unspecified standard, was not sufficiently "serious" to warrant constitutional protection. That result is not merely inconsistent with our holding in Roth; it is nothing less than a rejection of the fundamental First Amendment premises and rationale of the Roth opinion and an invitation to widespread suppression of sexually oriented speech. Before today, the protections of the First Amendment have never been thought limited to expressions of *serious* literary or political value. See Gooding v Wilson, 405 US 518, 31 L Ed 2d 408, 92 S Ct 1103 (1972); Cohen v California, 403 US 15, 25–26, 29 L Ed 2d 284, 91 S Ct 1780 (1971); Terminiello v Chicago, 337 US 1, 4–5, 93 L Ed 1131, 69 S Ct 894 (1949).

Although the Court concedes that "Roth presumed 'obscenity' to be 'utterly without redeeming social importance,'" it argues that Memoirs produced "a drastically altered test that called on the prosecution to prove a negative, i.e., that the material was 'utterly without redeeming social value'—a burden virtually impossible to discharge under our criminal standards of proof."[15] One should hardly need to point out that under the third component of the Court's test the prosecution is still required to "prove a negative"—i.e., that the material lacks serious literary, artistic, political, or scientific value. Whether it will be easier to prove that material lacks "serious" value than to prove that it lacks any value at all remains, of course, to be seen.

In any case, even if the Court's approach left undamaged the conceptual framework of Roth, and even if it clearly barred the suppression of works with at least some social value, I would nevertheless be compelled to reject it. For it is beyond dispute that the approach can have no ameliorative impact on the cluster of problems that grow out of the vagueness of our current standards. Indeed, even the Court makes no argument that the refor-

14. "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." Roth v United States, supra, at 484, 1 L Ed 2d 1498.

15. Miller v California, ante, at 22, 37 L Ed 2d at 429.

mulation will provide fairer notice to booksellers, theater owners, and the reading and viewing public. Nor does the Court contend that the approach will provide clearer guidance to law enforcement officials or reduce the chill on protected expression. Nor, finally, does the Court suggest that the approach will mitigate to the slightest degree the institutional problems that have plagued this Court and the State and federal judiciary as a direct result of the uncertainty inherent in any definition of obscenity.

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Of course, the Court's restated Roth test does limit the definition of obscenity to depictions of physical conduct and explicit sexual acts. And that limitation may seem, at first glance, a welcome and clarifying addition to the Roth-Memoirs formula. But, just as the agreement in Roth on an abstract definition of obscenity gave little hint of the extreme difficulty that was to follow in attempting to apply that definition to specific material, the mere formulation of a "physical conduct" test is no assurance that it can be applied with any greater facility. The Court does not indicate how it would apply its test to the materials involved in Miller v California, supra, and we can only speculate as to its application. But even a confirmed optimist could find little realistic comfort in the adoption of such a test. Indeed, the valiant attempt of one lower federal court to draw the constitutional line at depictions of explicit sexual conduct seems to belie any suggestion that this approach marks the road to clarity.[16] The Court surely demonstrates little sensitivity to our own institutional problems, much less the other vagueness-related difficulties, in establishing a system that requires us to consider whether a description of human genitals is sufficiently "lewd" to deprive it of constitutional protection; whether a sexual act is "ultimate"; whether the conduct depicted in materials before us fits within one of the categories of conduct whose depiction the State or Federal Governments have attempted to suppress; and a host of equally pointless inquiries. In addition, adoption of such a test does not, presumably, obviate the need for consideration of the nuances of presentation of sexually oriented material, yet it hardly clarifies the application of those opaque but important factors.

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If the application of the "physical conduct" test to pictorial material is fraught with difficulty, its application to textual material carries the potential for extraordinary abuse. Surely we have passed the point where the mere written description of sexual conduct is deprived of First Amendment protection. Yet the test offers no guidance to us, or anyone else, in determining which written descriptions of sexual conduct are protected, and which are not.

Ultimately, the reformulation must fail because it still leaves in this Court the responsibility of determining in each case whether the materials are protected by the First Amendment. The Court concedes that even under its restated formulation, the First Amendment inter-

16. Huffman v United States, 152 US App DC 238, 470 F2d 386 (1971). The test apparently requires an effort to distinguish between "singles" and "duals," between "erect penises" and "semi-erect penises," and between "ongoing sexual activity" and "imminent sexual activity."

ests at stake require "appellate courts to conduct an independent review of constitutional claims when necessary," Miller v California, 413 US, at 25, 37 L Ed 2d at 431, citing Mr. Justice Harlan's opinion in Roth, where he stated, "I do not understand how the Court can resolve the constitutional problems now before it without making its own independent judgment upon the character of the material upon which these convictions were based." 354 US, at 498, 1 L Ed 2d 1498. Thus, the Court's new formulation will not relieve us of "the awesome task of making case by case at once the criminal and the constitutional law."[17] And the careful efforts of state and lower federal courts to apply the standard will remain an essentially pointless exercise, in view of the need for an ultimate

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decision by this Court. In addition, since the status of sexually oriented material will necessarily remain in doubt until final decision by this Court, the new approach will not diminish the chill on protected expression that derives from the uncertainty of the underlying standard. I am convinced that a definition of obscenity in terms of physical conduct cannot provide sufficient clarity to afford fair notice, to avoid a chill on protected expression, and to minimize the institutional stress, so long as that definition is used to justify the outright suppression of any material that is asserted to fall within its terms.

3. I have also considered the possibility of reducing our own role, and the role of appellate courts generally, in determining whether particular matter is obscene. Thus, we might conclude that juries are best suited to determine obscenity vel non and that jury verdicts in this area should not be set aside except in cases of extreme departure from prevailing standards. Or, more generally, we might adopt the position that where a lower federal or state court has conscientiously applied the constitutional standard, its finding of obscenity will be no more vulnerable to reversal by this Court than any finding of fact. Cf. Interstate Circuit, Inc. v Dallas, 390 US, at 706–707, 20 L Ed 2d 225 (separate opinion of Harlan, J.). While the point was not clearly resolved prior to our decision in Redrup v New York, 386 US 767, 18 L Ed 2d 515, 87 S Ct 1414,[18] it is implicit in that decision that the First Amendment requires

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an independent review by appellate courts of the constitutional fact of obscenity.[19] That

17. Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U Pa L Rev 67, 81 (1960).

18. Compare Ginsberg v New York, 390 US 629, 672, 20 L Ed 2d 195, 88 S Ct 1274 (1968) (Fortas, J., dissenting), Jacobellis v Ohio, 378 US 184, 187–190, 12 L Ed 2d 793, 84 S Ct 1676 (1964) (Brennan, J., joined by Goldberg, J.), Manual Enterprises v Day, 370 US, at 488, 8 L Ed 2d 639 (Harlan, J., joined by Stewart, J.), and Kingsley Pictures Corp. v Regents, 360 US 684, 696–697, 3 L Ed 2d 1512, 79 S Ct 1362 (1959) (Frankfurter, J., concurring), id., at 708, 3 L Ed 2d 1512 (Harlan, J., joined by Frankfurter, J., and Whittaker, J., concurring), with Jacobellis v Ohio, supra, at 202–203, 12 L Ed 2d 793 (Warren, C. J., joined by Clark, J., dissenting), Roth v United States, 354 US, at 492 n 30, 1 L Ed 2d 498, and Kingsley Books, Inc. v Brown, 354 US 436, 448, 1 L Ed 2d 1469, 77 S Ct 1325 (1957) (Brennan, J., dissenting). See also Walker v Ohio, 398 US 434, 26 L Ed 2d 385, 90 S Ct 1884 (1970) (Burger, C. J., dissenting).

19. Mr. Justice Harlan, it bears noting, considered this requirement critical for review of not only federal but state convictions, despite his view that the States were accorded more latitude than the Federal Government in defining obscenity. See, e. g., Roth, supra, at 502–503, 1 L Ed 2d 1498 (separate opinion).

result is required by principles applicable to the obscenity issue no less than to any other area involving free expression, see, e. g., New York Times Co. v Sullivan, 376 US 254, 284–285, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412 (1964), or other constitutional right.[20] In any event, even if the Constitution would permit us to refrain from judging for ourselves the alleged obscenity of particular materials, that approach would solve at best only a small part of our problem. For while it would mitigate the institutional stress produced by the Roth approach, it would neither offer nor produce any cure for the other vices of vagueness. Far from providing a clearer guide to permissible primary conduct, the approach would inevitably lead to even greater uncertainty and the consequent due process problems of fair notice. And the approach would expose much protected, sexually oriented expression to the vagaries of jury determinations. Cf. Herndon v Lowry, 301 US 242, 263, 81 L Ed 1066, 57 S Ct 732 (1937). Plainly, the institutional gain would be more than offset by the unprecedented infringement of First Amendment rights.

4. Finally, I have considered the view, urged so forcefully since 1957 by our Brothers Black and Douglas, that the First Amendment bars the suppression of any sexually oriented expression. That position would effect a sharp reduction, although perhaps not a total elimination, of the uncertainty that surrounds our current

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approach. Nevertheless, I am convinced that it would achieve that desirable goal only by stripping the States of power to an extent that cannot be justified by the commands of the Constitution, at least so long as there is available an alternative approach that strikes a better balance between the guarantee of free expression and the States' legitimate interests.

V

Our experience since Roth requires us not only to abandon the effort to pick out obscene materials on a case-by-case basis, but also to reconsider a fundamental postulate of Roth: that there exists a definable class of sexually oriented expression that may be totally suppressed by the Federal and State Governments. Assuming that such a class of expression does in fact exist,[21] I am forced to conclude that the concept of "obscenity" cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms. Given these inevitable side effects of state efforts to suppress what is assumed to be *unprotected* speech, we must scrutinize with care the state interest that is asserted to justify the suppression. For in the absence of some very substantial interest in suppressing such speech, we can hardly condone the ill effects that seem to flow inevitably from the effort.[22]

20. See generally Culombe v Connecticut, 367 US 568, 603–606, 6 L Ed 2d 1037, 81 S Ct 1860 (1961) (opinion of Frankfurter, J.); cf. Crowell v Benson, 285 US 22, 54–65, 76 L Ed 598, 52 S Ct 285 (1932); Ng Fung Ho v White, 259 US 276, 284–285, 66 L Ed 938, 42 S Ct 492 (1922).

21. See n 9, supra.

22. Cf. United States v O'Brien, 391 US 367, 376–377, 20 L Ed 2d 672, 88 S Ct 1673 (1968):

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Obscenity laws have a long history in this country. Most of the States that had ratified the Constitution by 1792 punished the related crime of blasphemy or profanity despite the guarantees of free expression in their constitutions, and Massachusetts expressly prohibited the "Composing, Writing, Printing, or Publishing, of any Filthy Obscene or Prophane Song, Pamphlet, Libel or Mock-Sermon, in Imitation or in Mimicking of Preaching, or any other part of Divine Worship." Acts and Laws of Massachusetts Bay Colony (1726), Acts of 1711–1712, c 1, p 218. In 1815 the first reported obscenity conviction was obtained under the common law of Pennsylvania. See Commonwealth v Sharpless, 2 S & R 91. A conviction in Massachusetts under its common law and colonial statute followed six years later. See Commonwealth v Holmes, 17 Mass 336 (1821). In 1821 Vermont passed the first state law proscribing the publication or sale of "lewd or obscene" material, Laws of Vermont, 1824, c XXXII, No. 1, § 23, and federal legislation barring the importation of similar matter appeared in 1842. See Customs Law of 1842, § 28, 5 Stat 566. Although the number of early obscenity laws was small and their enforcement exceedingly lax, the situation significantly changed after about 1870 when Federal and State Governments, mainly as a result of the efforts

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of Anthony Comstock, took an active interest in the suppression of obscenity. By the end of the 19th century at least 30 States had some type of general prohibition on the dissemination of obscene materials, and by the time of our decision in Roth no State was without some provision on the subject. The Federal Government meanwhile had enacted no fewer than 20 obscenity laws between 1842 and 1956. See Roth v United States, 354 US, at 482–483, 485, 1 L Ed 2d 1498; Report of the Commission on Obscenity and Pornography 300–301 (1970).

This history caused us to conclude in Roth "that the unconditional phrasing of the First Amendment [that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."] was not intended to protect every utterance." 354 US, at 483, 1 L Ed 2d 1498. It also caused us to hold, as numerous prior decisions of this Court had assumed, see id., at 481, 1 L Ed 2d 1498, that obscenity could be denied the protection of the First Amendment and hence suppressed because it is a form of expression "utterly without redeeming social importance," id., at 484, 1 L Ed 2d 1498, as "mirrored in the universal judgment that [it] should be restrained . . . ." Id., at 485, 1 L Ed 2d 1498.

"This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (Footnotes omitted.)

See also Speiser v Randall, 357 US 513, 2 L Ed 2d 1460, 78 S Ct 1332 (1958).

Because we assumed—incorrectly, as experience has proved—that obscenity could be separated from other sexually oriented expression without significant costs either to the First Amendment or to the judicial machinery charged with the task of safeguarding First Amendment freedoms, we had no occasion in Roth to probe the asserted state interest in curtailing unprotected, sexually oriented speech. Yet 386 US 767, 18 L Ed 2d 515, 87 S Ct 1414 (1967) as we have increasingly come to appreciate the vagueness of the concept of obscenity, we have begun to recognize and articulate the state interests at stake. Significantly, in Redrup v New York, 386 US 767, 18 L Ed 2d 515, 87 S Ct 1414 (1967) where we set aside findings

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of obscenity with regard to three sets of material, we pointed out that

"[i]n none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See Prince v Massachusetts, 321 US 158, [88 L Ed 645, 64 S Ct 438]; cf. Butler v Michigan, 352 US 380, [1 L Ed 2d 412, 77 S Ct 524]. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. Breard v Alexandria, 341 US 622, [95 L Ed 1233, 71 S Ct 920, 35 ALR2d 335]; Public Utilities Comm'n v Pollak, 343 US 451, [96 L Ed 1068, 72 S Ct 813]. And in none was there evidence of the sort of 'pandering' which the Court found significant in Ginzburg v United States, 383 US 463, [16 L Ed 2d 31, 86 S Ct 942]." 386 US, at 769, 18 L Ed 2d 515.

See Rowan v Post Office Dept., 397 US 728, 25 L Ed 2d 736, 90 S Ct 1484 (1970); Stanley v Georgia, 394 US, at 567, 22 L Ed 2d 542.[23]

The opinions in Redrup and Stanley v Georgia reflected our emerging view that the state interests in protecting children and in protecting unconsenting adults may stand on a different footing from the other asserted state interests. It may well be, as one commentator has argued, that "exposure to [erotic material] is for some persons an intense emotional experience. A communication of this nature, imposed upon a person contrary to his wishes,

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has all the characteristics of a physical assault. . . . [And it] constitutes an invasion of his privacy . . . ."[24] But cf. Cohen v California, 403 US, at 21–22, 29 L Ed 2d 284. Similarly, if children are "not possessed of that full capacity for individual choice which is the presupposition of the First Amendment guarantees," Ginsberg

23. See also Rabe v Washington, 405 US 313, 317, 31 L Ed 2d 258, 92 S Ct 993 (1972) (concurring opinion); United States v Reidel, 402 US 351, 360–362, 28 L Ed 2d 813, 91 S Ct 1410 (1971) (separate opinion); Ginsberg v New York, 390 US 629, 20 L Ed 2d 195, 88 S Ct 1274 (1968); id., at 674–675, 20 L Ed 2d 195 (dissenting opinion); Redmond v United States, 384 US 264, 265, 16 L Ed 2d 521, 86 S Ct 1415 (1966); Ginzburg v United States, 383 US 463, 16 L Ed 2d 31, 86 S Ct 942 (1966); id., at 498 n 1, 16 L Ed 2d 31 (dissenting opinion); Memoirs v Massachusetts, 383 US 413, 421 n 8, 16 L Ed 2d 1, 86 S Ct 975 (1966); Jacobellis v Ohio, 378 US, at 195, 12 L Ed 2d 793 (opinion of Brennan, J., joined by Goldberg, J.); id., at 201, 12 L Ed 2d 793 (dissenting opinion). See also Report of the Commission on Obscenity and Pornography 300–301 (1970) (focus of early obscenity laws on protection of youth).

24. T. Emerson, The System of Freedom of Expression 496 (1970).

v New York, 390 US, at 649–650, 20 L Ed 2d 195 (Stewart, J., concurring), then the State may have a substantial interest in precluding the flow of obscene materials even to consenting juveniles.[25] But cf. id., at 673–674, 20 L Ed 2d 195 (Fortas, J., dissenting).

But, whatever the strength of the state interests in protecting juveniles and unconsenting adults from exposure to sexually oriented materials, those interests cannot be asserted in defense of the holding of the Georgia Supreme Court in this case. That court assumed for the purposes of its decision that the films in issue were exhibited only to persons over the age of 21 who viewed them willingly and with prior knowledge of the nature of their contents. And on that assumption the state court held that the films could still be suppressed. The justification for the suppression must be found, therefore, in some independent interest in regulating the reading and viewing habits of consenting adults.

At the outset it should be noted that virtually all of the interests that might be asserted in defense of suppression, laying aside the special interests associated with distribution to juveniles and unconsenting adults, were also posited in Stanley v Georgia, supra, where we held that the State could not make the "mere private possession of obscene material a crime." Id., at 568, 22 L Ed 2d 542. That decision presages the conclusions I reach here today.

In Stanley we pointed out that "[t]here appears to be

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little empirical basis for" the assertion that "exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence." Id., at 566 and n 9, 22 L Ed 2d 542.[26] In any event, we added that "if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that '[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law . . . .' Whitney v California, 274 US 357, 378, [71 L Ed 1095, 47 S Ct 641] (1927) (Brandeis, J., concurring)." Id., at 566–567, 22 L Ed 2d 542.

Moreover, in Stanley we rejected as "wholly inconsistent with the philosophy of the First Amendment," id., at 566, 22 L Ed 2d 542, the notion that there is a legitimate state concern in the "control [of] the moral content of a person's thoughts," id., at 565, 22 L Ed 2d 542, and we held that a State "cannot constitutionally premise legisla-

25. See ibid.

26. Indeed, since Stanley was decided, the President's Commission on Obscenity and Pornography has concluded:

"In sum, empirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults. The Commission cannot conclude that exposure to erotic materials is a factor in the causation of sex crime or sex delinquency." Report of the Commission on Obscenity and Pornography 27 (1970) (footnote omitted).

To the contrary, the Commission found that "[o]n the positive side, explicit sexual materials are sought as a source of entertainment and information by substantial numbers of American adults. At times, these materials also appear to serve to increase and facilitate constructive communication about sexual matters within marriage." Id., at 53.

tion on the desirability of controlling a person's private thoughts." Id., at 566, 22 L Ed 2d 542. That is not to say, of course, that a State must remain utterly indifferent to—and take no action bearing on—the morality of the community. The traditional description

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of state police power does embrace the regulation of morals as well as the health, safety, and general welfare of the citizenry. See, e. g., Village of Euclid v Ambler Realty Co., 272 US 365, 395, 71 L Ed 303, 47 S Ct 114, 54 ALR 1016 (1926). And much legislation—compulsory public education laws, civil rights laws, even the abolition of capital punishment—is grounded, at least in part, on a concern with the morality of the community. But the State's interest in regulating morality by suppressing obscenity, while often asserted, remains essentially unfocused and ill defined. And, since the attempt to curtail unprotected speech necessarily spills over into the area of protected speech, the effort to serve this speculative interest through the suppression of obscene material must tread heavily on rights protected by the First Amendment.

In Roe v Wade, 410 US 113, 35 L Ed 2d 147, 93 S Ct 705 (1973), we held constitutionally invalid a state abortion law, even though we were aware of

> "the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion." Id., at 116, 35 L Ed 2d 147.

Like the proscription of abortions, the effort to suppress obscenity is predicated on unprovable, although strongly held, assumptions about human behavior, morality, sex, and religion.[27] The existence of these assumptions cannot

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validate a statute that substantially undermines the guarantees of the First Amendment, any more than the existence of similar assumptions on the issue of abortion can validate a statute that infringes the constitutionally protected privacy interests of a pregnant woman.

If, as the Court today assumes, "a state legislature may . . . act on the . . . assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior," ante, at 63, 37 L Ed 2d at 460, then it is hard to see how state-ordered regimentation of our minds can ever be forestalled. For if a State may, in an effort to maintain or create a particular moral tone, prescribe what its citizens cannot read or cannot see, then it would seem to follow that in pursuit of that same objective a State could decree that its citizens must read certain books or must view certain films. Cf. United States v Roth, 237 F2d 796, 823 (CA2 1956) (Frank, J., concurring). However laudable its goal—and that is obviously a

27. See Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Col L Rev 391, 395 (1963).

question on which reasonable minds may differ—the State cannot proceed by means that violate the Constitution. The precise point was established a half century ago in Meyer v Nebraska, 262 US 390, 67 L Ed 1042, 43 S Ct 625, 29 ALR 1446 (1923).

> "That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.
>
> [413 US 111]
>
> "For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: 'That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.' In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution." Id., at 401–402, 67 L Ed 1042, 29 ALR 1446.

Recognizing these principles, we have held that so-called thematic obscenity—obscenity which might persuade the viewer or reader to engage in "obscene" conduct—is not outside the protection of the First Amendment:

> "It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is
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> [413 US 112]
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> not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing." Kingsley Pictures Corp. v Regents, 360 US 684, 688–689, 3 L Ed 2d 1512, 79 S Ct 1362 (1959).

Even a legitimate, sharply focused state concern for the morality of the community cannot, in other words,

justify an assault on the protections of the First Amendment. Cf. Griswold v Connecticut, 381 US 479, 14 L Ed 2d 510, 85 S Ct 1678 (1965); Eisenstadt v Baird, 405 US 438, 31 L Ed 2d 349, 92 S Ct 1029 (1972); Loving v Virginia, 388 US 1, 18 L Ed 2d 1010, 87 S Ct 1817 (1967). Where the state interest in regulation of morality is vague and ill defined, interference with the guarantees of the First Amendment is even more difficult to justify.[28]

In short, while I cannot say that the interests of the State—apart from the question of juveniles and unconsenting adults—are trivial or nonexistent, I am compelled to conclude that these interests cannot justify the substantial damage to constitutional rights and to this Nation's judicial machinery that inevitably results

[413 US 113]

from state efforts to bar the distribution even of unprotected material to consenting adults. NAACP v Alabama, 377 US 288, 307, 12 L Ed 2d 325, 84 S Ct 1302 (1964); Cantwell v Connecticut, 310 US, at 304, 84 L Ed 1213, 128 ALR 1352. I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly "obscene" contents. Nothing in this approach precludes those governments from taking action to serve what may be strong and legitimate interests through regulation of the manner of distribution of sexually oriented material.

VI

Two Terms ago we noted that

> "there is developing sentiment that adults should have complete freedom to produce, deal in, possess and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age. The concepts involved are said to be so elusive and the laws so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and the courts that basic reassessment is not only wise but essential." United States v Reidel, 402 US, at 357, 28 L Ed 813.

Nevertheless, we concluded that "the task of restructuring the obscenity laws lies with those who pass, repeal, and amend statutes and ordinances." Ibid. But the law of obscenity has been fashioned by this Court—and necessarily so under our

28. "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, Terminiello v Chicago, 337 US 1, 93 L Ed 1131, 69 S Ct 894 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." Tinker v Des Moines School District, 393 US 503, 508–509, 21 L Ed 2d 731, 89 S Ct 733 (1969). See also Cohen v California, 403 US 15, 23, 29 L Ed 2d 284, 91 S Ct 1780 (1971).

duty to enforce the Constitution.
[413 US 114]

It is surely the duty of this Court, as expounder of the Constitution, to provide a remedy for the present unsatisfactory state of affairs. I do not pretend to have found a complete and infallible answer to what Mr. Justice Harlan called "the intractable obscenity problem." Interstate Circuit, Inc. v Dallas, 390 US, at 704, 20 L Ed 2d 225 (separate opinion). See also Memoirs v Massachusetts, 383 US, at 456, 16 L Ed 2d 1 (dissenting opinion). Difficult questions must still be faced, notably in the areas of distribution to juveniles and offensive exposure to unconsenting adults. Whatever the extent of state power to regulate in those areas,[29] it should be clear that the view I espouse today would introduce a large measure of clarity to this troubled area, would reduce the institutional pressure on this Court and the rest of the State and Federal Judiciary, and would guarantee fuller freedom of expression while leaving room for the protection of legitimate governmental interests. Since the Supreme Court of Georgia erroneously concluded that the State has power to suppress sexually oriented material even in the absence of distribution to juveniles or exposure to unconsenting adults, I would reverse that judgment and remand the case to that court for further proceedings not inconsistent with this opinion.

29. The Court erroneously states, Miller v California, ante, at 27, 37 L Ed 2d at 419, that the author of this opinion "indicates that suppression of unprotected obscene material is permissible to avoid exposure to unconsenting adults . . . and to juveniles . . . ." I defer expression of my views as to the scope of state power in these areas until cases squarely presenting these questions are before the Court. See n 9, supra; Miller v California, supra (dissenting opinion).

[413 US 139]

UNITED STATES, Appellant,

v

GEORGE JOSEPH ORITO

413 US 139, 37 L Ed 2d 513, 93 S Ct 2674

[No. 70–69]

Argued January 19, 1972. Reargued November 7, 1972.
Decided June 21, 1973.

SUMMARY

The defendant was charged in the United States District Court for the Eastern District of Wisconsin with a violation of 18 USCS § 1462, which prohibits any person from knowingly transporting obscene material in interstate or foreign commerce by means of a common carrier. The District Court granted the defendant's motion to dismiss the indictment, holding that the statute was unconstitutionally overbroad since it failed to distinguish between "public" and "non-public" transportation, that is, transportation for private use of the materials or transportation involving no risk of exposure to children or unwilling adults (338 F Supp 308).

On direct appeal, the United States Supreme Court vacated and remanded. In an opinion by BURGER, Ch. J., expressing the views of 5 members of the court, it was held that (1) the First Amendment right to possess obscene material in the privacy of one's home did not create a correlative right to transport such material, and (2) thus § 1462 was not unconstitutionally overbroad on First Amendment grounds in proscribing "non-public" transportation as well as "public" transportation of obscene material.

DOUGLAS, J., dissented on the ground that given the right to possess obscene material in one's home, § 1462 was unconstitutionally overbroad in covering obscene material designed for personal use.

BRENNAN, J., joined by STEWART and MARSHALL, JJ., dissenting, expressed the view that whatever the extent of the federal government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, § 1462 was overbroad and unconstitutional on its face.

Briefs of Counsel, p 1112, infra.

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Constitutional Law § 930 — obscene materials — interstate transportation

1. The federal statute (18 USCS § 1462) which prohibits any person from knowingly transporting any obscene material in interstate or foreign commerce by means of a common carrier is not unconstitutionally overbroad on First Amendment grounds in proscribing "non-public" transportation—that is, transportation for private use of the materials or transportation involving no risk of exposure to children or unwilling adults—as well as "public" transportation of obscene materials.

Constitutional Law § 930 — obscene materials — private possession and use

2. The constitutional right to possess obscene materials in the privacy of one's home does not create a correlative right to receive it, transport it, or distribute it; there is no zone of constitutionally protected privacy which follows obscene materials when they are moved outside the protected home area.

Constitutional Law § 101 — privacy rights — obscenity

3. Although the Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, mother-

hood, childrearing, and education, nevertheless viewing obscene films in a commercial theater open to the adult public, or transporting such films in common carriers in interstate commerce, has no claim to such special consideration.

Constitutional Law § 930 — First Amendment — obscenity

4. Obscene material is not protected under the First Amendment.

Indecency, Lewdness, and Obscenity § 1 — regulation — government interest

5. The government has a legitimate interest in protecting the public commercial environment by preventing obscene materials from entering the stream of commerce.

Constitutional Law § 930 — obscene material — interstate transportation

6. The Constitution does not forbid comprehensive federal regulation of interstate transportation of obscene material merely because such transport may be by private carriage, or because material is intended for the private use of the transporter.

Commerce § 86 — transportation of obscene material — federal regulation

7. With regard to regulation of interstate transportation of obscene material, Congress may regulate on the basis of the natural tendency of material in the home being kept private and the contrary tendency once material leaves that area, regardless of a transporter's professed intent; Congress may reasonably determine that such regulation is necessary to effect permissible federal control of interstate commerce in obscene materials, based as such regulation is on a legislatively determined risk of ultimate exposure to juveniles or to the public and the harm that exposure could cause.

Commerce § 72; Courts § 116 — legislative motive — judicial control

8. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.

Commerce § 69 — regulation by Congress

9. Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral, or economic nature.

Commerce § 66 — regulation by Congress

10. Congress may regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other states from the state of origin.

Appeal and Error § 1692.3 — obscenity prosecution — remand

11. Upon concluding that a Federal District Court, in a criminal prosecution under 18 USCS § 1462, erred in holding that the statute, which prohibits transportation of obscene material in interstate or foreign commerce by means of common carrier, was unconstitutional, the United States Supreme Court will vacate the District Court's decision dismissing the indictment, and will remand the case for reconsideration of the sufficiency of the indictment in light of new standards for distinguishing obscene material from protected free speech, as announced by the Supreme Court in other cases decided on the same day as the instant case, where the District Court had made no determination of the obscenity of the material involved in view of the summary dismissal of the indictment.

SYLLABUS BY REPORTER OF DECISIONS

Appellee was charged with knowingly tranporting obscene material by common carrier in interstate commerce, in violation of 18 USC § 1462 [18 USCS § 1462]. The District Court granted his motion to dismiss, holding the statute unconstitutionally overbroad for failing to distinguish between public and nonpublic transportation. Appellee relies on Stanley v Georgia, 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243. *Held:* Congress has the power to prevent obscene material, which is not protected by the First Amendment, from entering the stream of commerce. The zone of privacy that Stanley protected does not extend beyond the home. See United States v 12 200-Ft. Reels of Film, 413 US 123, 37 L Ed 2d 500, 93 S Ct 2665; Paris Adult Theatre I v Slaton, 413 US 49, 37 L Ed 2d 446, 93 S Ct 2628. This case is remanded to the District Court for reconsideration of the sufficiency of the indictment in light of Miller v California, 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607; United States v 12 200-Ft. Reels of Film, supra, and this opinion.

338 F Supp 308, vacated and remanded.

Burger, C. J., delivered the opinion of the Court, in which White, Blackmun, Powell, and Rehnquist, JJ., joined. Douglas, J., filed a dissenting opinion, post, p 145, 37 L Ed 2d, p 520. Brennan, J., filed a dissenting opinion, in which Stewart and Marshall, JJ., joined, post, p 147, 37 L Ed 2d, p 520.

APPEARANCES OF COUNSEL

R. Kent Greenawalt argued the cause for appellant.

Solicitor General **Erwin N. Griswold** argued the cause for appellant on the reargument.

James M. Shellow argued the cause for appellee.

Briefs of Counsel, p 1112, infra.

OPINION OF THE COURT

[413 US 140]

Mr. Chief Justice **Burger** delivered the opinion of the Court.

Appellee Orito was charged in the United States District Court for the Eastern District of Wisconsin with a violation of 18 USC § 1462 [18 USCS § 1462][1] in that he did "knowingly transport and carry in interstate commerce from San Francisco . . . to Milwaukee . . . by means of a common carrier, that is, Trans-World Airlines and North Central Airlines, copies of [specified] obscene, lewd, lascivious, and filthy materials . . . ." The materials specified included some 83 reels of film, with as many as eight to 10 copies of some of the films. Appellee moved to dismiss the indictment on the ground that the statute violated his First and Ninth Amendment rights.[2] The District Court granted his motion, holding that the

1. Title 18 USC § 1462 [18 USCS § 1462] provides in pertinent part:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; . . .

. . . . . .

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

2. Appellee also moved to dismiss the indictment on the grounds that 18 USC § 1462 [18 USCS § 1462] does not require proof of scienter. That issue was not reached by the District Court and is not before us now.

statute was unconstitutionally overbroad since it failed to distinguish between "public" and "non-public" transportation of obscene material. The District Court interpreted this Court's decisions in Griswold v Connecticut, 381 US 479, 14 L Ed 2d 510, 85 S Ct 1678 (1965); Redrup v New York, 386 US 767, 18 L Ed 2d 515, 87 S Ct 1414 (1967); and Stanley v Georgia, 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243 (1969), to establish

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the proposition that "non-public transportation" of obscene material was constitutionally protected.[3]

Although the District Court held the statute void on its face for overbreadth, it is not clear whether the statute was held to be overbroad because it covered transportation intended solely for the private use of the transporter, or because, regardless of the intended use of the material, the statute extended to "private carriage" or "nonpublic" transportation which in itself involved no risk of exposure to children or unwilling adults. The United States brought this direct appeal under the former 18 USC § 3731 [18 USCS § 3731] (1964 ed) now amended, Pub L 91–644, § 14 (a), 84 Stat 1890. See United States v Spector, 343 US 169, 171, 96 L Ed 863, 72 S Ct 591 (1952).

[1, 2] The District Court erred in striking down 18 USC § 1462 [18 USCS § 1462] and dismissing appellee's indictment on these "privacy" grounds. The essence of appellee's contentions is that Stanley has firmly established the right to possess obscene material in the privacy of the home and that this creates a correlative right to receive it, transport it, or distribute it. We have rejected that reasoning. This case was decided by the District Court before our decisions in United States v Thirty-seven Photographs, 402 US 363, 28 L Ed 2d 822, 91 S Ct 1400 (1971), and United States v Reidel, 402 US 351, 28 L Ed 2d 813, 91 S Ct 1410 (1971). Those holdings negate the idea that some zone of constitutionally protected privacy

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follows such material when it is moved outside the home area protected by Stanley.[4] United States v Thirty-seven Photographs, supra, at 376, 28 L Ed 2d 822 (opinion of White, J.). United States v Reidel, supra, at 354–356, 28 L Ed 2d 813. See United States v Zacher, 332 F Supp 883, 885–886 (ED Wis 1971). But cf. United States v Thirty-seven Photographs, supra, at 379, 28 L Ed 2d 822 (Stewart, J., concurring).

[3] The Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education. See Eisenstadt v Baird, 405 US 438, 453–454, 31 L Ed 2d 349, 92 S Ct

3. The District Court stated:
"By analogy, it follows that with the right to read obscene matters comes the right to transport or to receive such material when done in a fashion that does not pander it or impose it upon unwilling adults or upon minors.

. . . . .

"I find no meaningful distinction between the private possession which was held to be protected in Stanley and the non-public transportation which the statute at bar proscribes." 338 F Supp 308, 310 (1970).

4. "These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs *in the privacy of his own home.*" Stanley v Georgia, 394 US 557, 565, 22 L Ed 2d 542, 89 S Ct 1243 (1969). (Emphasis added.)

1029 (1972); Loving v Virginia, 388 US 1, 12, 18 L Ed 2d 1010, 87 S Ct 1817 (1967); Griswold v Connecticut, supra, at 486, 14 L Ed 2d 510; Prince v Massachusetts, 321 US 158, 166, 88 L Ed 645, 64 S Ct 438 (1944); Skinner v Oklahoma, 316 US 535, 541, 86 L Ed 1655, 62 S Ct 1110 (1942); Pierce v Society of Sisters, 268 US 510, 535, 69 L Ed 1070, 45 S Ct 571, 39 ALR 468 (1925). But viewing obscene films in a commercial theater open to the adult public, see Paris Adult Theatre I v Slaton, 413 US, at 65–67, 37 L Ed 2d 461–462, or transporting such films in common carriers in interstate commerce, has no claim to such special consideration.[5] It is hardly necessary to catalog the myriad activities that may be lawfully conducted

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within the privacy and confines of the home, but may be prohibited in public. The Court has consistently rejected constitutional protection for obscene material outside the home. See United States v 12 200-Ft. Reels of Film, 413 US, at 126–129, 37 L Ed 2d 505; Miller v California, 413 US, at 23, 37 L Ed 2d at 430–431; United States v Reidel, supra, at 354–356, 28 L Ed 2d 813 (opinion of White, J.); id., at 357–360, 28 L Ed 2d 813 (Harlan, J., concurring); Roth v United States, 354 US 476, 484–485, 1 L Ed 2d 1498, 77 S Ct 1304 (1957).

[4–10] Given (a) that obscene material is not protected under the First Amendment, Miller v California, supra, Roth v United States, supra, (b) that the Government has a legitimate interest in protecting the public commercial environment by preventing such material from entering the stream of commerce, see Paris Adult Theatre I, 413 US, at 57–64, 37 L Ed 2d at 446, and (c) that no constitutionally protected privacy is involved, United States v Thirty-seven Photographs, supra, at 376, 28 L Ed 2d 822 (opinion of White, J.), we cannot say that the Constitution forbids comprehensive federal regulation of interstate transportation of obscene material merely because such transport may be by private carriage, or because the material is intended for the private use of the transporter. That the transporter has an abstract proprietary power to shield the obscene material from all others and to guard the material with the same privacy as in the home is not controlling. Congress may regulate on the basis of the natural tendency of material in the home being kept private and the contrary tendency once material leaves that area, regardless of a transporter's professed intent. Congress could reasonably determine such regulation to be necessary to effect permissible federal control of interstate commerce in obscene material, based as that regulation is on a legislatively determined risk of ultimate exposure to juveniles or to the public and the harm that exposure

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could cause. See Paris Adult Theatre I v Slaton, 413 US, at 57–63, 37 L Ed 2d at 457–460. See

5. The Solicitor General indicates that the tariffs of most, if not all, common carriers include a right of inspection. Resorting to common carriers, like entering a place of public accommodation, does not involve the privacies associated with the home. See United States v Thirty-seven Photographs, 402 US 363, 376, 28 L Ed 2d 822, 91 S Ct 1400 (1971) (opinion of White, J.); United States v Reidel, 402 US 351, 359–360, 28 L Ed 2d 813, 91 S Ct 1410 (1971) (Harlan, J., concurring); Poe v Ullman, 367 US 497, 551–552, 6 L Ed 2d 989, 81 S Ct 1752 (1961) (Harlan, J., dissenting); Miller v United States, 431 F2d 655, 657 (CA9 1970); United States v Melvin, 419 F2d 136, 139 (CA4 1969).

also United States v Alpers, 338 US 680, 681–685, 94 L Ed 457, 70 S Ct 352 (1950); Brooks v United States, 267 US 432, 436–437, 69 L Ed 699, 45 S Ct 345, 37 ALR 1407 (1925); Weber v Freed, 239 US 325, 329–330, 60 L Ed 308, 36 S Ct 131 (1915). "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. McCray v United States, 195 US 27, 49 L Ed 78, 24 S Ct 769; Sonzinsky v United States, 300 US 506, 513, 81 L Ed 772, 57 S Ct 554 and cases cited." United States v Darby, 312 US 100, 115, 85 L Ed 609, 61 S Ct 451, 132 ALR 1430 (1941). "It is sufficient to reiterate the well-settled principle that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature." North American Co. v SEC, 327 US 686, 705, 90 L Ed 945, 66 S Ct 785 (1946).[6]

[413 US 145]

[11] As this case came to us on the District Court's summary dismissal of the indictment, no determination of the obscenity of the material involved has been made. Today, for the first time since Roth v United States, supra, we have arrived at standards accepted by a majority of this Court for distinguishing obscene material, unprotected by the First Amendment, from protected free speech. See Miller v California, 413 US, at 23–24, 37 L Ed 2d at 430, 431; United States v 12 200-Ft. Reels of Film, 413 US, at 130 n 737, L Ed 2d at 507. The decision of the District Court is therefore vacated and the case is remanded for reconsideration of the sufficiency of the indictment in light of Miller v California, supra; United States v 12 200-Ft. Reels, supra; and this opinion.

Vacated and remanded.

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[10] 6. "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce. . . . In the Lottery Case, 188 US 321, 47 L Ed 492, 23 S Ct 321, it was held that Congress might pass a law punishing the transmission of lottery tickets from one State to another, in order to prevent the carriage of those tickets to be sold in other States and thus demoralize, through a spread of the gambling habit, individuals who were likely to purchase. . . . In Hoke v United States, 227 US 308, 57 L Ed 523, 33 S Ct 281 and Caminetti v United States, 242 US 470, 61 L Ed 442, 37 S Ct 192, the so-called White Slave Traffic Act, which was construed to punish any person engaged in enticing a woman from one State to another for immoral ends, whether for commercial purposes or otherwise, was valid because it was intended to prevent the use of interstate commerce to facilitate prostitution or concubinage, and other forms of immorality. . . . In Weber v Freed, 239 US 325, 60 L Ed 308, 36 S Ct 131, it was held that Congress had power to prohibit the importation of pictorial representations of prize fights designed for public exhibition, because of the demoralizing effect of such exhibitions in the State of destination." Brooks v United States, 267 US 432, 436–437, 69 L Ed 699, 45 S Ct 345, 37 ALR 1407 (1925).

SEPARATE OPINIONS

Mr. Justice **Douglas**, dissenting.

We held in Stanley v Georgia, 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243, that an individual reading or examining "obscene" materials in the privacy of his home is protected against state prosecution by reason of the First Amendment made applicable to the States by reason of the Fourteenth. We said:

"These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases —the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that appellant does not have these rights, that there are certain types of materials that the individual may not read or even possess. Georgia justifies this assertion by arguing that

[413 US 146]

the films in the present case are obscene. But we think that mere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." Id., at 565, 22 L Ed 2d 542.

By that reasoning a person who reads an "obscene" book on an airline or bus or train is protected. So is he who carries an "obscene" book in his pocket during a journey for his intended personal enjoyment. So is he who carries the book in his baggage or has a trucking company move his household effects to a new residence. Yet 18 USC § 1462* [18 USCS § 1462] makes such interstate carriage unlawful. Appellee therefore moved to dismiss the indictment on the ground that § 1462 is so broad as to cover "obscene" material designed for personal use.

The District Court granted the motion, holding that § 1462 was overbroad and in violation of the First Amendment.

The conclusion is too obvious for argument, unless we are to overrule Stanley. I would abide by Stanley and affirm the judgment dismissing the indictment.

[413 US 147]

Mr. Justice **Brennan**, with whom Mr. Justice **Stewart** and Mr. Justice **Marshall** join, dissenting.

We noted probable jurisdiction to consider the constitutionality of 18 USC § 1462 [18 USCS § 1462], which makes it a federal offense to

* "Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character."

"[bring] into the United States, or any place subject to the jurisdiction thereof, or knowingly [use] any express company or other common carrier, for carriage in interstate or foreign commerce—(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character." Appellee was charged in a one-count indictment with having knowingly transported in interstate commerce over 80 reels of allegedly obscene motion picture film. Relying primarily on our decision in Stanley v Georgia, 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243 (1969), the United States District Court for the Eastern District of Wisconsin dismissed the indictment, holding the statute unconstitutional on its face:

"To prevent the pandering of obscene materials or its exposure to children or to unwilling adults, the government has a substantial and valid interest to bar the non-private transportation of such materials. However, the statute which is now before the court does not so delimit the government's prerogatives; on its face, it forbids the transportation of obscene materials. Thus, it applies to non-public transportation in the absence of a special governmental interest. The statute is thus overbroad, in violation of the first and ninth amendments, and is therefore unconstitutional." 338 F Supp 308, 311 (ED Wis 1970).

Under the view expressed in my dissent today in Paris Adult Theatre I v Slaton, 413 US, p 73, 37 L Ed 2d p 467, it is clear that the statute before us cannot stand. Whatever the extent of

[413 US 148]

the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face. See my dissent in Miller v California, 413 US, p 47, 37 L Ed 2d p 444. I would therefore affirm the judgment of the District Court.

[515 US 646]

VERNONIA SCHOOL DISTRICT 47J, Petitioner
v
WAYNE ACTON, et ux., Guardians ad Litem for JAMES ACTON

515 US 646, 132 L Ed 2d 564, 115 S Ct 2386

[No. 94-590]

Argued March 28, 1995. Decided June 26, 1995.

Decision: School district's policy authorizing urinalysis drug testing of students who participated in district's athletics programs held not to violate Federal Constitution's Fourth Amendment.

SUMMARY

Teachers and administrators in an Oregon public school district observed a sharp increase in student drug use and disciplinary problems. Because drug use increases the risk of sports-related injuries, the school district was particularly concerned with the fact that student athletes were leaders of the drug culture. After a parent "input night" at which the parents in attendance gave their unanimous approval to a proposed urinalysis drug testing policy for student athletes, the district's school board implemented the policy, under which (1) all students wishing to participate in interscholastic athletics had to sign a form consenting to the testing and had to obtain their parents' written consent to the testing, (2) athletes were tested at the beginning of the season for their sport, and (3) random testing of 10 percent of the athletes was done weekly during the season. A seventh grade student was denied participation in the district's football program because the student and his parents refused to sign the testing consent forms. The student and his parents filed a suit seeking declaratory and injunctive relief from enforcement of the drug testing policy on the grounds that the policy violated the Federal Constitution's Fourth Amendment and a provision of the Oregon Constitution. After the United States District Court for the

SUBJECT OF ANNOTATION

Beginning on page 1021, infra

Taking of individual's bodily fluid or material for analysis or comparison as violating individual's rights under Federal Constitution—Supreme Court cases

Summaries of Briefs; Names of Participating Attorneys, p 1068, infra.

District of Oregon dismissed the suit (796 F Supp 1354), the United States Court of Appeals for the Ninth Circuit, expressing the view that the policy violated the Fourth Amendment and the Oregon constitutional provision, reversed the District Court's judgment (23 F3d 1514).

On certiorari, the United States Supreme Court vacated and remanded. In an opinion by SCALIA, J., joined by REHNQUIST, Ch. J., and KENNEDY, THOMAS, GINSBURG, and BREYER, JJ., it was held that the drug testing policy did not violate the student's right, under the Fourth Amendment, to be free from unreasonable searches—where the District Court had found that student drug problems in the school district, particularly with respect to students involved in interscholastic athletics, were severe enough to demonstrate a need to address such problems—because the policy was reasonable under the circumstances, taking into account (1) the decreased expectation of privacy with regard to students, particularly student athletes, (2) the relative unobtrusiveness of the search, and (3) the severity of the need met by the search.

GINSBURG, J., concurring, expressed the view that the court's opinion reserved the question whether the school district, on no more than the showing made in the instant case, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports but on all students required to attend school.

O'CONNOR, J., joined by STEVENS, and SOUTER, JJ, dissenting, expressed the view that (1) suspicionless drug testing was not justified on the facts, since (a) exceptions to the general view that mass suspicionless searches are per se unreasonable within the meaning of the Fourth Amendment had been allowed by the Supreme Court only where it was clear that a suspicion-based regime would be ineffectual, and (b) such was not the circumstance in this case; and (2) the drug testing policy had two other flaws, in that (a) there was virtually no evidence in the record of a drug problem at the grade school that the student attended when the litigation began, and (b) even as to the school district's high school, the choice of student athletes as the class to subject to suspicionless testing was unreasonable.

HEADNOTES

Classified to United States Supreme Court Digest, Lawyers' Edition

Search and Seizure § 15 — urinalysis drug testing — student athletes

1a-1d. A public school district's urinalysis drug testing policy implemented by the school board for student athletes, under which policy all students wishing to participate in interscholastic athletics are tested at the beginning of the season for their sport and random testing of 10 percent of the athletes is done weekly during the season, does not violate the right, of a seventh grader who wishes to participate in the school district's football program, to be free, under the Federal Constitution's Fourth Amendment, from unreasonable searches—where the record shows no objection to the policy by any parents other than the parents of the student in question, even

though a public meeting has been held to obtain parents' views, and where a Federal District Court has found that student drug problems in the school district, particularly with respect to students involved in interscholastic athletics, were severe enough to demonstrate a need to address such problems—because the policy is reasonable under the circumstances, taking into account (1) the decreased expectation of privacy with regard to students, particularly student athletes, (2) the relative unobtrusiveness of the search, and (3) the severity of the need met by the search. (O'Connor, Stevens, and Souter, JJ., dissented from this holding.)

[See annotation p 1021, infra]

Search and Seizure § 5.7 — reasonableness standard

2. Under the Federal Constitution's Fourth Amendment, the ultimate measure of the constitutionality of a governmental search is reasonableness; at least in a case involving the type of search for which there was no clear practice, either approving or disapproving the type of search, at the time the Fourth Amendment was adopted, whether a particular search meets the reasonableness standard is judged by balancing the search's intrusion on the individual's Fourth Amendment interests against the search's promotion of legitimate governmental interests.

[See annotation p 1021, infra]

Search and Seizure §§ 5, 25 — necessity of warrant — probable cause

3. Under the Federal Constitution's Fourth Amendment, a warrant is not required to establish the reasonableness of all government searches, and when a warrant is not required—and the Fourth Amendment's warrant clause requiring probable cause for the issuance of a warrant therefore is not applicable—probable cause is not invariably required either.

[See annotation p 1021, infra]

Search and Seizure § 5 — construction of Fourth Amendment

4. The Federal Constitution's Fourth Amendment imposes no irreducible requirement of individualized suspicion to justify a search by the government.

[See annotation p 1021, infra]

Search and Seizure §§ 5, 6, 8 — expectations of privacy — location

5. The Federal Constitution's Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as legitimate; what expectations are legitimate varies with context, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park; in addition, the legitimacy of certain privacy expectations in relation to the state may depend upon the individual's legal relationship with the state.

[See annotation p 1021, infra]

Infants § 1 — rights

6. Unemancipated minors lack some of the most fundamental rights of self-determination, including even the right of liberty in its narrow sense, that is, the right to come and go at will; they are subject, even as to their physical freedom, to the control of their parents or guardians.

Schools § 12 — private schools

7. When parents place minor children in private schools for the children's education, the teachers and administrators of those schools stand in loco parentis over the children entrusted to them; a child's tutor or schoolmaster who stands in loco parentis over the child has such a por-

tion of the power of the child's parent concerning restraint or correction as may be necessary to answer the purposes for which the tutor or schoolmaster is employed.

Schools § 9 — students

8. The parental power exercised by schools over their students is not subject to federal constitutional constraints.

Schools § 9 — pupils' constitutional rights

9a, 9b. Although children do not shed their federal constitutional rights at the schoolhouse gate, the nature of those rights is what is appropriate for children in school; the Federal Constitution's Fourth Amendment rights, no less than the Constitution's First and Fourteenth Amendment rights, are different in public schools than elsewhere.

Search and Seizure § 6 — expectation of privacy — student athletes

10. For purposes of determining the reasonableness of a search under the Federal Constitution's Fourth Amendment, public school students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy; the reasonableness inquiry cannot disregard the schools' custodial and tutelary responsibility for children; particularly with regard to medical examinations and procedures, students within the school environment have a lesser expectation of privacy than members of the population generally; legitimate privacy expectations are even less with regard to student athletes, who, by choosing to go out for a team, voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.

[See annotation p 1021, infra]

Search and Seizure §§ 15, 18 — urinalysis drug testing — student athletes — furnishing information to officials

11a-11c. For purposes of determining whether a public school district's policy authorizing urinalysis drug testing of students who participate in the district's athletics programs authorizes unreasonable searches in violation of the Federal Constitution's Fourth Amendment, the invasion of privacy under the policy is not significant, because (1) the privacy interests compromised by the process of obtaining the urine samples is negligible, where (a) male students produce samples at a urinal along a wall, remain fully clothed, and are observed only from behind, if at all, (b) female students produce samples in an enclosed stall, with a female monitor standing outside listening for only sounds of tampering, and (c) these conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially school children use daily; and (2) with respect to the information disclosed concerning the state of the subject's body and the material that the subject has ingested, (a) the tests at issue look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic, (b) the drugs for which the samples are screened are standard and do not vary according to the identity of the student, (c) the test results are disclosed to only a limited class of school personnel who have a need to know, and the results are not turned over to law enforcement authorities or used for any internal disciplinary function, and (d) as to the requirement that, to avoid sanc-

tions for a falsely positive test, students must identify in advance the prescription medications that the students are taking, (i) the United States Supreme Court has never indicated that requiring advance disclosure of medications is per se unreasonable, and (ii) the drug testing policy does not require that medication information be given to school officials, rather than, for example, being delivered in a sealed envelope to the testing lab.

Search and Seizure § 5 — probable cause

12a, 12b. Under the Federal Constitution's Fourth Amendment, searches for evidence of criminal wrongdoing generally require probable cause.

Search and Seizure § 5.7 — compelling state interest

13. In the context of the prohibition, under the Federal Constitution's Fourth Amendment, of unreasonable searches, the phrase "compelling state interest" does not describe a fixed minimum quantum of governmental concern; rather, the phrase describes an interest which appears important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy.

Search and Seizure § 15 — urinalysis drug testing — student athletes — governmental concern

14a, 14b. For purposes of determining whether a public school district's policy authorizing urinalysis drug testing of students who participate in the district's athletics programs authorizes unreasonable searches in violation of the Federal Constitution's Fourth Amendment, the nature and immediacy of the governmental concern, as well as the efficacy of the means of meeting such concern, support a finding of reasonableness, because (1) the nature of the concern for deterring drug use by the nation's school children is important and perhaps compelling, since (a) school years are a time when the physical, psychological, and addictive effects of drugs are most severe, (b) the effects of a drug-infested school are visited upon the entire student body and faculty, as the educational process is disrupted, (c) the evil is being visited upon children for whom the state has taken a special responsibility of care and direction, and (d) the risk of immediate physical harm to a drug-using athlete or to those with whom the athlete is playing the athlete's sport is particularly high; (2) as for the immediacy of the school district's concerns, the United States Supreme Court cannot find clearly erroneous a Federal District Court's conclusions that (a) a large segment of the student body, particularly those involved in interscholastic athletics, is in a state of rebellion, (b) disciplinary actions have reached epidemic proportions, and (c) the rebellion is being fueled by alcohol and drug abuse as well as by the students' misperceptions about the drug culture; and (3) as to the efficacy of the means for addressing the problem, (a) it seems self-evident that a drug problem largely fueled by the "role model" effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs, and (b) with respect to the argument that a less intrusive means—drug testing on suspicion of drug use—is available, (i) the Supreme Court has repeatedly refused to declare that only the least intrusive search practicable can be reasonable under the Fourth Amendment, and (ii) in many respects, testing based on suspicion of drug use would not be better but worse.

[See annotation p 1021, infra]

Search and Seizure § 7 — role of government

15. Just as when the government conducts a search in its capacity as

an employer—for example, a warrantless search of an absent employee's desk to obtain an urgently needed file—the relevant question, as to the reasonableness of a search under the Federal Constitution's Fourth Amendment, is whether that intrusion upon privacy is one that a reasonable employer might engage in, so also when the government acts as a guardian and a tutor, the relevant question is whether the search is one that a reasonable guardian and tutor might undertake.

[See annotation p 1021, infra]

Appeal § 1692.3 — remand — misconception as to law

16. On certiorari to review a Federal Court of Appeals' decision holding that a public school district's urinalysis drug testing policy for student athletes violates the Federal Constitution's Fourth Amendment, the United States Supreme Court will vacate the judgment of the Court of Appeals and will remand the case to the Court of Appeals for further proceedings—where the Court of Appeals holds that the policy not only violates the Fourth Amendment but also, by reason of that violation, contravenes a particular provision of the constitution of the state in which the school district is located—because the Supreme Court's conclusion that the holding concerning the Fourth Amendment is in error means that the holding concerning the state constitution rests on a flawed premise.

RESEARCH REFERENCES

25 Am Jur 2d, Drugs, Narcotics, and Poisons § 92; 68 Am Jur 2d, Schools §§ 252, 259; 68 Am Jur 2d, Searches and Seizures §§ 11, 17, 193

22 Am Jur Pl & Pr Forms (Rev), Searches and Seizures, Form 121

26 Am Jur Proof of Fact 2d 465, Consent to Search Given Under Coercive Circumstances

USCS, Constitution, Amendment 4

L Ed Digest, Search and Seizure § 15

L Ed Index, Drugs and Narcotics; Schools and Education; Urinalysis

ALR Index, Drugs and Narcotics; Privacy; Schools and Education; Search and Seizure; Urine Test

Annotations:

Supreme Court's views as to the federal legal aspects of the right of privacy. 43 L Ed 2d 871.

Validity, under Federal Constitution, of regulations, rules, or statutes allowing drug testing of students. 87 ALR Fed 148.

Propriety of search involving removal of natural substance or foreign object from body by actual or threatened force. 66 ALR Fed 119.

Search conducted by school official or teacher as violation of Fourth Amendment or equivalent state constitutional provision. 31 ALR5th 229.

Search and seizure: reasonable expectation of privacy in public restroom. 74 ALR4th 508.

APPEARANCES OF COUNSEL ARGUING CASE

Timothy R. Volpert argued the cause for petitioner.

Richard H. Seamon argued the cause for the United States, as amicus curiae, by special leave of court.

Thomas M. Christ argued the cause for respondents.

Summaries of Briefs; Names of Participating Attorneys, p 1068, infra.

SYLLABUS BY REPORTER OF DECISIONS

Motivated by the discovery that athletes were leaders in the student drug culture and concern that drug use increases the risk of sports-related injury, petitioner school district (District) adopted the Student Athlete Drug Policy (Policy), which authorizes random urinalysis drug testing of students who participate in its athletics programs. Respondent Acton was denied participation in his school's football program when he and his parents (also respondents) refused to consent to the testing. They then filed this suit, seeking declaratory and injunctive relief on the grounds that the Policy violated the Fourth and Fourteenth Amendments and the Oregon Constitution. The District Court denied the claims, but the Court of Appeals reversed, holding that the Policy violated both the Federal and State Constitutions.

Held: The Policy is constitutional under the Fourth and Fourteenth Amendments.

(a) State-compelled collection and testing of urine constitutes a "search" under the Fourth Amendment. *Skinner* v *Railway Labor Executives' Assn.*, 489 US 602, 617, 103 L Ed 2d 639, 109 S Ct 1402. Where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted, the "reasonableness" of a search is judged by balancing the intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental interests.

(b) The first factor to be considered in determining reasonableness is the nature of the privacy interest on which the search intrudes. Here, the subjects of the Policy are children who have been committed to the temporary custody of the State as schoolmaster; in that capacity, the State may exercise a degree of supervision and control greater than it could exercise over free adults. The requirements that public school children submit to physical examinations and be vaccinated indicate that they have a lesser privacy expectation with regard to medical examinations and procedures than the general population. Student athletes have even less of a legitimate privacy expectation, for an element of communal undress is inherent in athletic participation, and athletes are subject to preseason physical exams and rules regulating their conduct.

(c) The privacy interests compromised by the process of obtaining urine samples under the Policy are

negligible, since the conditions of collection are nearly identical to those typically encountered in public restrooms. In addition, the tests look only for standard drugs, not medical conditions, and the results are released to a limited group.

(d) The nature and immediacy of the governmental concern at issue, and the efficacy of this means for meeting it, also favor a finding of reasonableness. The importance of deterring drug use by all this Nation's schoolchildren cannot be doubted. Moreover, the Policy is directed more narrowly to drug use by athletes, where the risk of physical harm to the user and other players is high. The District Court's conclusion that the District's concerns were immediate is not clearly erroneous, and it is self-evident that a drug problem largely caused by athletes, and of particular danger to athletes, is effectively addressed by ensuring that athletes do not use drugs. The Fourth Amendment does not require that the "least intrusive" search be conducted, so respondents' argument that the drug testing could be based on suspicion of drug use, if true, would not be fatal; and that alternative entails its own substantial difficulties.

23 F3d 1514, vacated and remanded.

Scalia, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Kennedy, Thomas, Ginsburg, and Breyer, JJ., joined. Ginsburg, J., filed a concurring opinion. O'Connor, J., filed a dissenting opinion, in which Stevens and Souter, JJ., joined.

OPINION OF THE COURT

[515 US 648]

Justice **Scalia** delivered the opinion of the Court.

[1a] The Student Athlete Drug Policy adopted by School District 47J in the town of Vernonia, Oregon, authorizes random urinalysis drug testing of students who participate in the District's school athletics programs. We granted certiorari to decide whether this violates the Fourth and Fourteenth Amendments to the United States Constitution.

I

A

Petitioner Vernonia School District 47J (District) operates one high school and three grade schools in the logging community of Vernonia, Oregon. As elsewhere in small-town America, school sports play a prominent role in the town's life, and student athletes are admired in their schools and in the community.

Drugs had not been a major problem in Vernonia schools. In the mid-to-late 1980's, however, teachers and administrators observed a sharp increase in drug use. Students began to speak out about their attraction to the drug culture, and to boast that there was nothing the school could do about it. Along with more drugs came more disciplinary problems.

[515 US 649]

Between 1988 and 1989 the number of disciplinary referrals in Vernonia schools rose to more than twice the number reported in the early 1980's, and several students were suspended. Students became increasingly rude during class; outbursts of profane language became common.

Not only were student athletes included among the drug users but, as the District Court found, athletes were the leaders of the drug culture.

796 F Supp 1354, 1357 (Or 1992). This caused the District's administrators particular concern, since drug use increases the risk of sports-related injury. Expert testimony at the trial confirmed the deleterious effects of drugs on motivation, memory, judgment, reaction, coordination, and performance. The high school football and wrestling coach witnessed a severe sternum injury suffered by a wrestler, and various omissions of safety procedures and misexecutions by football players, all attributable in his belief to the effects of drug use.

Initially, the District responded to the drug problem by offering special classes, speakers, and presentations designed to deter drug use. It even brought in a specially trained dog to detect drugs, but the drug problem persisted. According to the District Court:

> "[T]he administration was at its wits end and . . . a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion. Disciplinary actions had reached 'epidemic proportions.' The coincidence of an almost three-fold increase in classroom disruptions and disciplinary reports along with the staff's direct observations of students using drugs or glamorizing drug and alcohol use led the administration to the inescapable conclusion that the rebellion was being fueled by alcohol and drug abuse as well as the student's misperceptions about the drug culture." *Ibid.*

At that point, District officials began considering a drug-testing program. They held a parent "input night" to discuss

[515 US 650]

the proposed Student Athlete Drug Policy (Policy), and the parents in attendance gave their unanimous approval. The school board approved the Policy for implementation in the fall of 1989. Its expressed purpose is to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs.

B

The Policy applies to all students participating in interscholastic athletics. Students wishing to play sports must sign a form consenting to the testing and must obtain the written consent of their parents. Athletes are tested at the beginning of the season for their sport. In addition, once each week of the season the names of the athletes are placed in a "pool" from which a student, with the supervision of two adults, blindly draws the names of 10% of the athletes for random testing. Those selected are notified and tested that same day, if possible.

The student to be tested completes a specimen control form which bears an assigned number. Prescription medications that the student is taking must be identified by providing a copy of the prescription or a doctor's authorization. The student then enters an empty locker room accompanied by an adult monitor of the same sex. Each boy selected produces a sample at a urinal, remaining fully clothed with his back to the monitor, who stands approximately 12 to 15 feet behind the student. Monitors may (though do not always) watch the student while he produces the sample, and they listen for normal sounds of urination. Girls produce samples in an enclosed bathroom stall, so that they can be heard but not observed. After the sample is

produced, it is given to the monitor, who checks it for temperature and tampering and then transfers it to a vial.

The samples are sent to an independent laboratory, which routinely tests them for amphetamines, cocaine, and marijuana. Other drugs, such as LSD, may be screened at the

[515 US 651]

request of the District, but the identity of a particular student does not determine which drugs will be tested. The laboratory's procedures are 99.94% accurate. The District follows strict procedures regarding the chain of custody and access to test results. The laboratory does not know the identity of the students whose samples it tests. It is authorized to mail written test reports only to the superintendent and to provide test results to District personnel by telephone only after the requesting official recites a code confirming his authority. Only the superintendent, principals, vice-principals, and athletic directors have access to test results, and the results are not kept for more than one year.

If a sample tests positive, a second test is administered as soon as possible to confirm the result. If the second test is negative, no further action is taken. If the second test is positive, the athlete's parents are notified, and the school principal convenes a meeting with the student and his parents, at which the student is given the option of (1) participating for six weeks in an assistance program that includes weekly urinalysis, or (2) suffering suspension from athletics for the remainder of the current season and the next athletic season. The student is then retested prior to the start of the next athletic season for which he or she is eligible. The Policy states that a second offense results in automatic imposition of option (2); a third offense in suspension for the remainder of the current season and the next two athletic seasons.

C

In the fall of 1991, respondent James Acton, then a seventh grader, signed up to play football at one of the District's grade schools. He was denied participation, however, because he and his parents refused to sign the testing consent forms. The Actons filed suit, seeking declaratory and injunctive relief from enforcement of the Policy on the grounds that it violated the Fourth and Fourteenth Amendments to the United States Constitution and Article I, § 9, of the Oregon

[515 US 652]

Constitution. After a bench trial, the District Court entered an order denying the claims on the merits and dismissing the action. 796 F Supp, at 1355. The United States Court of Appeals for the Ninth Circuit reversed, holding that the Policy violated both the Fourth and Fourteenth Amendments and Article I, § 9, of the Oregon Constitution. 23 F3d 1514 (1994). We granted certiorari. 513 US 1013, 130 L Ed 2d 488, 115 S Ct 571 (1994).

II

The Fourth Amendment to the United States Constitution provides that the Federal Government shall not violate "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." We have held that the Fourteenth Amendment extends this constitutional guarantee to searches and seizures by state officers, *Elkins* v *United States*, 364 US 206, 213, 4 L

Ed 2d 1669, 80 S Ct 1437 (1960), including public school officials, *New Jersey* v *T. L. O.*, 469 US 325, 336-337, 83 L Ed 2d 720, 105 S Ct 733 (1985). In *Skinner* v *Railway Labor Executives' Assn.*, 489 US 602, 617, 103 L Ed 2d 639, 109 S Ct 1402 (1989), we held that state-compelled collection and testing of urine, such as that required by the Policy, constitutes a "search" subject to the demands of the Fourth Amendment. See also *Treasury Employees* v *Von Raab*, 489 US 656, 665, 103 L Ed 2d 685, 109 S Ct 1384 (1989).

[2, 3] As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is "reasonableness." At least in a case such as this, where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted,[1] whether a particular search meets the reasonableness standard " 'is judged by balancing

[515 US 653]

its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.' " *Skinner, supra*, at 619, 103 L Ed 2d 639, 109 S Ct 1402 (quoting *Delaware* v *Prouse*, 440 US 648, 654, 59 L Ed 2d 660, 99 S Ct 1391 (1979)). Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant, *Skinner, supra*, at 619, 103 L Ed 2d 639, 109 S Ct 1402. Warrants cannot be issued, of course, without the showing of probable cause required by the Warrant Clause. But a warrant is not required to establish the reasonableness of *all* government searches; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either. A search unsupported by probable cause can be constitutional, we have said, "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin* v *Wisconsin*, 483 US 868, 873, 97 L Ed 2d 709, 107 S Ct 3164 (1987) (internal quotation marks omitted).

[4] We have found such "special needs" to exist in the public school context. There, the warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed," and "strict adherence to the requirement that searches be based on probable cause" would undercut "the substantial need of teachers and administrators for freedom to maintain order in the schools." *T. L. O.*, 469 US, at 340, 341, 83 L Ed 2d 720, 105 S Ct 733. The school search we approved in *T. L. O.*, while not based on probable cause, *was* based on individualized *suspicion* of wrongdoing. As we explicitly acknowledged, however, " 'the Fourth Amendment imposes no irreducible requirement of such suspicion,' " *id.*, at 342, n 8, 83 L Ed 2d 720, 105 S Ct 733 (quoting *United States* v *Martinez-Fuerte*, 428 US

1. Not until 1852 did Massachusetts, the pioneer in the "common school" movement, enact a compulsory school-attendance law, and as late as the 1870's only 14 States had such laws. R. Butts, Public Education in the United States From Revolution to Reform 102-103 (1978); 1 Children and Youth in America 467-468 (R. Bremner ed 1970). The drug problem, and the technology of drug testing, are of course even more recent.

543, 560-561, 49 L Ed 2d 1116, 96 S Ct 3074 (1976)). We have upheld suspicionless searches and seizures to conduct drug testing of railroad personnel involved in train accidents, see *Skinner, supra;* to conduct random drug testing of federal customs officers who carry arms or are involved in drug interdiction,

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see *Von Raab, supra;* and to maintain automobile checkpoints looking for illegal immigrants and contraband, *Martinez-Fuerte, supra*, and drunk drivers, *Michigan Dept. of State Police* v *Sitz*, 496 US 444, 110 L Ed 2d 412, 110 S Ct 2481 (1990).

III

[5] The first factor to be considered is the nature of the privacy interest upon which the search here at issue intrudes. The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as "legitimate." *T. L. O.*, 469 US, at 338, 83 L Ed 2d 720, 105 S Ct 733. What expectations are legitimate varies, of course, with context, *id.*, at 337, 83 L Ed 2d 720, 105 S Ct 733, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park. In addition, the legitimacy of certain privacy expectations vis-á-vis the State may depend upon the individual's legal relationship with the State. For example, in *Griffin, supra*, we held that, although a "probationer's home, like anyone else's, is protected by the Fourth Amendmen[t]," the supervisory relationship between probationer and State justifies "a degree of impingement upon [a probationer's] privacy that would not be constitutional if applied to the public at large." 483 US, at 873, 875, 97 L Ed 2d 709, 107 S Ct 3164. Central, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.

[6, 7] Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians. See 59 Am Jur 2d, Parent and Child § 10 (1987). When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them. In fact, the tutor or schoolmaster

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is the very prototype of that status. As Blackstone describes it, a parent "may . . . delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed." 1 W. Blackstone, Commentaries on the Laws of England 441 (1769).

[8, 9a] In *T. L. O.* we rejected the notion that public schools, like private schools, exercise only parental power over their students, which of course is not subject to constitutional constraints. 469 US, at 336, 83 L Ed 2d 720, 105 S Ct 733. Such a view of things, we said, "is not entirely 'consonant with compulsory education laws,'" *ibid.* (quoting *Ingraham* v *Wright*, 430 US 651, 662, 51 L Ed 2d 711, 97 S Ct 1401 (1977)), and is inconsistent with our prior de-

cisions treating school officials as state actors for purposes of the Due Process and Free Speech Clauses, *T. L. O., supra*, at 336, 83 L Ed 2d 720, 105 S Ct 733. But while denying that the State's power over schoolchildren is formally no more than the delegated power of their parents, *T. L. O.* did not deny, but indeed emphasized, that the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults. "[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." 469 US, at 339, 83 L Ed 2d 720, 105 S Ct 733. While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional "duty to protect," see *DeShaney* v *Winnebago County Dept. of Social Servs.*, 489 US 189, 200, 103 L Ed 2d 249, 109 S Ct 998 (1989), we have acknowledged that for many purposes "school authorities ac[t] *in loco parentis*," *Bethel School Dist. No. 403* v *Fraser*, 478 US 675, 684, 92 L Ed 2d 549, 106 S Ct 3159 (1986), with the power and indeed the duty to "inculcate the habits and manners of civility," *id.*, at 681, 92 L Ed 2d 549, 106 S Ct 3159 (internal quotation marks omitted). Thus, while children assuredly do not "shed their constitutional

[515 US 656]

rights . . . at the schoolhouse gate," *Tinker* v *Des Moines Independent Community School Dist.*, 393 US 503, 506, 21 L Ed 2d 731, 89 S Ct 733 (1969), the nature of those rights is what is appropriate for children in school. See, *e.g.*, *Goss* v *Lopez*, 419 US 565, 581-582, 42 L Ed 2d 725, 95 S Ct 729 (1975) (due process for a student challenging disciplinary suspension requires only that the teacher "informally discuss the alleged misconduct with the student minutes after it has occurred"); *Fraser, supra*, at 683, 92 L Ed 2d 549, 106 S Ct 3159 ("[I]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse"); *Hazelwood School Dist.* v *Kuhlmeier*, 484 US 260, 273, 98 L Ed 2d 592, 108 S Ct 562 (1988) (public school authorities may censor school-sponsored publications, so long as the censorship is "reasonably related to legitimate pedagogical concerns");*Ingraham, supra*, at 682, 51 L Ed 2d 711, 97 S Ct 1401 ("Imposing additional administrative safeguards [upon corporal punishment] . . . would . . . entail a significant intrusion into an area of primary educational responsibility").

[9b, 10] Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children. For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases. According to the American Academy of Pediatrics, most public schools "provide vision and hearing screening and dental and dermatological checks. . . . Others also mandate scoliosis screening at appropriate grade levels." Committee on School Health, American Academy of Pediatrics, School Health: A Guide for Health Professionals 2 (1987). In the 1991-1992 school year, all 50 States required public school stu-

dents to be vaccinated against diphtheria, measles, rubella, and polio. US Dept. of Health & Human Services, Public Health Service, Centers for Disease Control, State Immunization Requirements 1991-1992, p 1. Particularly with regard to medical examinations and procedures,

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therefore, "students within the school environment have a lesser expectation of privacy than members of the population generally." *T. L. O., supra*, at 348, 83 L Ed 2d 720, 105 S Ct 733 (Powell, J., concurring).

Legitimate privacy expectations are even less with regard to student athletes. School sports are not for the bashful. They require "suiting up" before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. The locker rooms in Vernonia are typical: No individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors. As the United States Court of Appeals for the Seventh Circuit has noted, there is "an element of 'communal undress' inherent in athletic participation," *Schaill by Kross* v *Tippecanoe County School Corp.*, 864 F2d 1309, 1318 (1988).

There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to "go out for the team," they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. In Vernonia's public schools, they must submit to a preseason physical exam (James testified that his included the giving of a urine sample, App 17), they must acquire adequate insurance coverage or sign an insurance waiver, maintain a minimum grade point average, and comply with any "rules of conduct, dress, training hours and related matters as may be established for each sport by the head coach and athletic director with the principal's approval." Record, Exh. 2, p 30, ¶ 8. Somewhat like adults who choose to participate in a "closely regulated industry," students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy. See *Skinner*, 489 US, at 627, 103 L Ed 2d 639, 109 S Ct 1402; *United States* v *Biswell*, 406 US 311, 316, 32 L Ed 2d 87, 92 S Ct 1593 (1972).

[515 US 658]

IV

[11a] Having considered the scope of the legitimate expectation of privacy at issue here, we turn next to the character of the intrusion that is complained of. We recognized in *Skinner* that collecting the samples for urinalysis intrudes upon "an excretory function traditionally shielded by great privacy." 489 US, at 626, 103 L Ed 2d 639, 109 S Ct 1402. We noted, however, that the degree of intrusion depends upon the manner in which production of the urine sample is monitored. *Ibid.* Under the District's Policy, male students produce samples at a urinal along a wall. They remain fully clothed and are only observed from behind, if at all. Female students produce samples in an enclosed stall, with a female monitor standing outside listening only for sounds of tampering. These conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially schoolchildren use daily. Under such conditions, the privacy interests compro-

mised by the process of obtaining the urine sample are in our view negligible.

[11b, 12a] The other privacy-invasive aspect of urinalysis is, of course, the information it discloses concerning the state of the subject's body, and the materials he has ingested. In this regard it is significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic. See *Skinner, id.*, at 617, 103 L Ed 2d 639, 109 S Ct 1402. Moreover, the drugs for which the samples are screened are standard, and do not vary according to the identity of the student. And finally, the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function. 796 F Supp, at 1364; see also 23 F3d, at 1521.[2]

[515 US 659]

[11c] Respondents argue, however, that the District's Policy is in fact more intrusive than this suggests, because it requires the students, if they are to avoid sanctions for a falsely positive test, to identify *in advance* prescription medications they are taking. We agree that this raises some cause for concern. In *Von Raab,* we flagged as one of the salutary features of the Customs Service drug-testing program the fact that employees were not required to disclose medical information unless they tested positive, and, even then, the information was supplied to a licensed physician rather than to the Government employer. See *Von Raab,* 489 US, at 672-673, n 2, 103 L Ed 2d 685, 109 S Ct 1384. On the other hand, we have never indicated that requiring advance disclosure of medications is *per se* unreasonable. Indeed, in *Skinner* we held that it was not "a significant invasion of privacy." 489 US, at 626, n 7, 103 L Ed 2d 639, 109 S Ct 1402. It can be argued that, in *Skinner*, the disclosure went only to the medical personnel taking the sample, and the Government personnel analyzing it, see *id.*, at 609, 103 L Ed 2d 639, 109 S Ct 1402, but see *id.*, at 610, 103 L Ed 2d 639, 109 S Ct 1402 (railroad personnel responsible for forwarding the sample, and presumably accompanying information, to the Government's testing lab); and that disclosure to teachers and coaches—to persons who personally *know* the student—is a greater invasion of privacy. Assuming for the sake of argument

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that both those propositions are true, we do not believe they

2. **[12b]** Despite the fact that, like routine school physicals and vaccinations—which the dissent apparently finds unobjectionable even though they "are both blanket searches of a sort," *post*, at 682, 132 L Ed 2d, at 593—the search here is undertaken for prophylactic and distinctly *non*punitive purposes (protecting student athletes from injury, and deterring drug use in the student population), see 796 F Supp, at 1363, the dissent would nonetheless lump this search together with "evidentiary" searches, which generally require probable cause, see *supra*, at 653, 132 L Ed 2d, at 574, because, from the student's perspective, the test may be "regarded" or "understood" as punishment, *post*, at 683-684, 132 L Ed 2d, at 594. In light of the District Court's findings regarding the purposes and consequences of the testing, any such perception is by definition an irrational one, which is protected nowhere else in the law. In any event, our point is not, as the dissent apparently believes, *post*, at 682-683, 132 L Ed 2d, at 593-594, that *since* student vaccinations and physical exams are constitutionally reasonable, student drug testing must be so as well; but rather that, by reason of those prevalent practices, public school children in general, and student athletes in particular, have a diminished expectation of privacy. See *supra*, at 656-657, 132 L Ed 2d, at 576-577.

establish a difference that respondents are entitled to rely on here.

The General Authorization Form that respondents refused to sign, which refusal was the basis for James's exclusion from the sports program, said only (in relevant part): "I . . . authorize the Vernonia School District to conduct a test on a urine specimen which I provide to test for drugs and/or alcohol use. I also authorize the release of information concerning the results of such a test to the Vernonia School District and to the parents and/or guardians of the student." App 10-11. While the practice of the District seems to have been to have a school official take medication information from the student at the time of the test, see *id.*, at 29, 42, that practice is not set forth in, or required by, the Policy, which says simply: "Student athletes who . . . are or have been taking prescription medication must provide verification (either by a copy of the prescription or by doctor's authorization) prior to being tested." *id.*, at 8. It may well be that, if and when James was selected for random testing at a time that he was taking medication, the School District would have permitted him to provide the requested information in a confidential manner—for example, in a sealed envelope delivered to the testing lab. Nothing in the Policy contradicts that, and when respondents choose, in effect, to challenge the Policy on its face, we will not assume the worst. Accordingly, we reach the same conclusion as in *Skinner:* that the invasion of privacy was not significant.

V

[13, 14a] Finally, we turn to consider the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it. In both *Skinner* and *Von Raab*, we characterized the government interest motivating the search as "compelling." *Skinner, supra*, at 628, 103 L Ed 2d 639, 109 S Ct 1402 (interest in preventing railway accidents); *Von Raab, supra*, at 670, 103 L Ed 2d 685, 109 S Ct 1384 (interest

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in ensuring fitness of customs officials to interdict drugs and handle firearms). Relying on these cases, the District Court held that because the District's program also called for drug testing in the absence of individualized suspicion, the District "must demonstrate a 'compelling need' for the program." 796 F Supp, at 1363. The Court of Appeals appears to have agreed with this view. See 23 F3d, at 1526. It is a mistake, however, to think that the phrase "compelling state interest," in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here? Rather, the phrase describes an interest that appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy. Whether that relatively high degree of government concern is necessary in this case or not, we think it is met.

[14b] That the nature of the concern is important—indeed, perhaps compelling—can hardly be doubted. Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs, which was

the governmental concern in *Von Raab, supra,* at 668, 103 L Ed 2d 685, 109 S Ct 1384, or deterring drug use by engineers and trainmen, which was the governmental concern in *Skinner, supra,* at 628, 103 L Ed 2d 639, 109 S Ct 1402. School years are the time when the physical, psychological, and addictive effects of drugs are most severe. "Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound"; "children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor." Hawley, The Bumpy Road to Drug-Free Schools, 72 Phi Delta Kappan 310, 314 (1990). See also Estroff, Schwartz, & Hoffmann, Adolescent Cocaine Abuse: Addictive Potential, Behavioral and Psychiatric Effects, 28 Clinical Pediatrics 550

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(Dec. 1989); Kandel, Davies, Karus, & Yamaguchi, The Consequences in Young Adulthood of Adolescent Drug Involvement, 43 Arch Gen Psychiatry 746 (Aug. 1986). And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted. In the present case, moreover, the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction. Finally, it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high. Apart from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes. Amphetamines produce an "artificially induced heart rate increase, [p]eripheral vasoconstriction, [b]lood pressure increase, and [m]asking of the normal fatigue response," making them a "very dangerous drug when used during exercise of any type." Hawkins, Drugs and Other Ingesta: Effects on Athletic Performance, in H. Appenzeller, Managing Sports and Risk Management Strategies 90, 90-91 (1993). Marijuana causes "[i]rregular blood pressure responses during changes in body position," "[r]eduction in the oxygen-carrying capacity of the blood," and "[i]nhibition of the normal sweating responses resulting in increased body temperature." *Id.*, at 94. Cocaine produces "[v]asoconstriction[,] [e]levated blood pressure," and "[p]ossible coronary artery spasms and myocardial infarction." *Ibid.*

As for the immediacy of the District's concerns: We are not inclined to question—indeed, we could not possibly find clearly erroneous—the District Court's conclusion that "a large segment of the student body, particularly those involved

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in interscholastic athletics, was in a state of rebellion," that "[d]isciplinary actions had reached 'epidemic proportions,'" and that "the rebellion was being fueled by alcohol and drug abuse as well as by the student's misperceptions about the drug culture." 796 F Supp, at 1357. That is an immediate crisis of greater proportions than existed in *Skinner*, where we upheld the Government's drug-testing program based on find-

ings of drug use by railroad employees nationwide, without proof that a problem existed on the particular railroads whose employees were subject to the test. See *Skinner,* 489 US, at 607, 103 L Ed 2d 639, 109 S Ct 1402. And of much greater proportions than existed in *Von Raab,* where there was no documented history of drug use by any customs officials. See *Von Raab,* 489 US, at 673, 103 L Ed 2d 685, 109 S Ct 1384; *id.,* at 683, 103 L Ed 2d 685, 109 S Ct 1384 (Scalia, J., dissenting).

As to the efficacy of this means for addressing the problem: It seems to us self-evident that a drug problem largely fueled by the "role model" effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs. Respondents argue that a "less intrusive means to the same end" was available, namely, "drug testing on suspicion of drug use." Brief for Respondents 45-46. We have repeatedly refused to declare that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment. *Skinner, supra,* at 629, n 9, 103 L Ed 2d 639, 109 S Ct 1402 (collecting cases). Respondents' alternative entails substantial difficulties—if it is indeed practicable at all. It may be impracticable, for one thing, simply because the parents who are willing to accept random drug testing for athletes are not willing to accept accusatory drug testing for all students, which transforms the process into a badge of shame. Respondents' proposal brings the risk that teachers will impose testing arbitrarily upon troublesome but not drug-likely students. It generates the expense of defending lawsuits that charge such arbitrary imposition, or that simply demand greater process before accusatory drug

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testing is imposed. And not least of all, it adds to the ever-expanding diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation. Cf. *Skinner, supra,* at 628, 103 L Ed 2d 639, 109 S Ct 1402 (quoting 50 Fed Reg 31526 (1985)) (a drug impaired individual "will seldom display any outward 'signs detectable by the lay person or, in many cases, even the physician.' "); *Goss,* 419 US, at 594, 42 L Ed 2d 725, 95 S Ct 729 (Powell, J., dissenting) ("There is an ongoing relationship, one in which the teacher must occupy many roles—educator, adviser, friend, and, at times, parent-substitute. It is rarely adversary in nature . . .") (footnote omitted). In many respects, we think, testing based on "suspicion" of drug use would not be better, but worse.[3]

3. There is no basis for the dissent's insinuation that in upholding the District's Policy we are equating the Fourth Amendment status of schoolchildren and prisoners, who, the dissent asserts, may have what it calls the "categorical protection" of a "strong preference for an individualized suspicion requirement," *post,* at 681, 132 L Ed 2d, at 592. The case on which it relies for that proposition, *Bell* v *Wolfish,* 441 US 520, 60 L Ed 2d 447, 99 S Ct 1861 (1979), displays no stronger a preference for individualized suspicion than we do today. It reiterates the proposition on which we rely, that " 'elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.' " *Id.,* at 559, n 40, 60 L Ed 2d 447, 99 S Ct 1861 (quoting *United States* v *Martinez-Fuerte,* 428 US 543, 556-557, n 12, 49 L Ed 2d 1116, 96 S Ct 3074 (1976)). Even *Wolfish's arguendo* "assum[ption] that the existence of less intrusive alternatives is relevant to the determination of

VI

[1b] Taking into account all the factors we have considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met

[515 US 665]

by the search—we conclude Vernonia's Policy is reasonable and hence constitutional.

[1c, 15] We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts. The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.[4] Just as when the government conducts a search in its capacity as employer (a warrantless search of an absent employee's desk to obtain an urgently needed file, for example), the relevant question is whether that intrusion upon privacy is one that a reasonable employer might engage in, see *O'Connor* v *Ortega*, 480 US 709, 94 L Ed 2d 714, 107 S Ct 1492 (1987); so also when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake. Given the findings of need made by the District Court, we conclude that in the present case it is.

[1d] We may note that the primary guardians of Vernonia's schoolchildren appear to agree. The record shows no objection to this district-wide program by any parents other than the couple before us here—even though, as we have described, a public meeting was held to obtain parents' views. We find insufficient basis to contradict the judgment of Vernonia's parents, its school board, and the District Court, as to what was reasonably in the interest of these children under the circumstances.

[515 US 666]

* * *

[16] The Ninth Circuit held that Vernonia's Policy not only violated the Fourth Amendment, but also, by reason of that violation, contravened Article I, § 9, of the Oregon Constitution. Our conclusion that the former holding was in error means that the latter holding rested on a flawed premise. We therefore vacate the judgment, and remand the case to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

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the reasonableness of the particular search method at issue," 441 US, at 559, n 40, 60 L Ed 2d 447, 99 S Ct 1861, does not support the dissent, for the opinion ultimately rejected the hypothesized alternative (as we do) on the ground that it would impair other policies important to the institution. See *id.*, at 560, n 40, 60 L Ed 2d 447, 99 S Ct 1861 (monitoring of visits instead of conducting body searches would destroy "the confidentiality and intimacy that these visits are intended to afford").

4. The dissent devotes a few meager paragraphs of its 21 pages to this central aspect of the testing program, see *post*, at 680-682, 132 L Ed 2d, at 592-593, in the course of which it shows none of the interest in the original meaning of the Fourth Amendment displayed elsewhere in the opinion, see *post*, at 669-671, 132 L Ed 2d, at 584-586. Of course at the time of the framing, as well as at the time of the adoption of the Fourteenth Amendment, children had substantially fewer "rights" than legislatures and courts confer upon them today. See 1 D. Kramer, Legal Rights of Children § 1.02, p 9 (2d ed 1994); Wald, Children's Rights: A Framework for Analysis, 12 U C D L Rev 255, 256 (1979).

SEPARATE OPINIONS

Justice **Ginsburg**, concurring.

The Court constantly observes that the School District's drug-testing policy applies only to students who voluntarily participate in interscholastic athletics. *Ante*, at 650, 657, 132 L Ed 2d, at 572, 577 (reduced privacy expectation and closer school regulation of student athletes), 662, 132 L Ed 2d, at 580 (drug use by athletes risks immediate physical harm to users and those with whom they play). Correspondingly, the most severe sanction allowed under the District's policy is suspension from extracurricular athletic programs. *Ante*, at 651, 132 L Ed 2d, at 573. I comprehend the Court's opinion as reserving the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school. Cf. *United States* v *Edwards*, 498 F2d 496, 500 (CA2 1974) (Friendly, J.) (in contrast to search without notice and opportunity to avoid examination, airport search of passengers and luggage is avoidable "by choosing not to travel by air") (internal quotation marks omitted).

Justice **O'Connor**, with whom Justice **Stevens** and Justice **Souter** join, dissenting.

The population of our Nation's public schools, grades 7 through 12, numbers around 18 million. See U.S. Dept. of

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Education, National Center for Education Statistics, Digest of Education Statistics 58 (1994) (Table 43). By the reasoning of today's decision, the millions of these students who participate in interscholastic sports, an overwhelming majority of whom have given school officials no reason whatsoever to suspect they use drugs at school, are open to an intrusive bodily search.

In justifying this result, the Court dispenses with a requirement of individualized suspicion on considered policy grounds. First, it explains that precisely because *every* student athlete is being tested, there is no concern that school officials might act arbitrarily in choosing whom to test. Second, a broad-based search regime, the Court reasons, dilutes the accusatory nature of the search. In making these policy arguments, of course, the Court sidesteps powerful, countervailing privacy concerns. Blanket searches, because they can involve "thousands or millions" of searches, "pos[e] a greater threat to liberty" than do suspicion-based ones, which "affec[t] one person at a time," *Illinois* v *Krull*, 480 US 340, 365, 94 L Ed 2d 364, 107 S Ct 1160 (1987) (O'Connor, J., dissenting). Searches based on individualized suspicion also afford potential targets considerable control over whether they will, in fact, be searched because a person can avoid such a search by not acting in an objectively suspicious way. And given that the surest way to avoid acting suspiciously is to avoid the underlying wrongdoing, the costs of such a regime, one would think, are minimal.

But whether a blanket search is "better," *ante*, at 664, 132 L Ed 2d, at 581, than a regime based on individualized suspicion is not a debate in which we should engage. In my view, it is not open to judges or government officials to decide on policy

grounds which is better and which is worse. For most of our constitutional history, mass, suspicionless searches have been generally considered *per se* unreasonable within the meaning of the Fourth Amendment. And we have allowed exceptions

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in recent years only where it has been clear that a suspicion-based regime would be ineffectual. Because that is not the case here, I dissent.

I

A

In *Carroll* v *United States*, 267 US 132, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (1925), the Court explained that "[t]he Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable." *Id.*, at 147, 69 L Ed 543, 45 S Ct 280, 39 ALR 790. Applying this standard, the Court first held that a search of a car was not unreasonable merely because it was warrantless; because obtaining a warrant is impractical for an easily movable object such as a car, the Court explained, a warrant is not required. The Court also held, however, that a warrantless car search *was* unreasonable unless supported by some level of individualized suspicion, namely, probable cause. Significantly, the Court did not base its conclusion on the *express* probable cause requirement contained in the Warrant Clause, which, as just noted, the Court found inapplicable. Rather, the Court rested its views on "what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted" and "[what] will conserve public interests as well as the interests and rights of individual citizens." *Id.*, at 149, 69 L Ed 543, 45 S Ct 280, 39 ALR 790. With respect to the "rights of individual citizens," the Court eventually offered the simple yet powerful intuition that "those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." *Id.*, at 154, 69 L Ed 543, 45 S Ct 280, 39 ALR 790.

More important for the purposes of this case, the Court clearly indicated that evenhanded treatment was no substitute for the individualized suspicion requirement:

> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on
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> [515 US 669]
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> the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search." *Id.*, at 153-154, 69 L Ed 543, 45 S Ct 280, 39 ALR 790.

The *Carroll* Court's view that blanket searches are "intolerable and unreasonable" is well grounded in history. As recently confirmed in one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken, see W. Cuddihy, The Fourth Amendment: Origins and Original Meaning (1990) (PhD Dissertation at Claremont Graduate School) (hereinafter Cuddihy), what the Framers of the Fourth Amendment most strongly opposed, with limited exceptions wholly inapplicable here, were general searches—that is, searches by general warrant, by writ of assistance, by broad statute, or by any other similar authority. See *id.*, at 1402, 1499, 1555; see also Clancy,

The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures, 25 Mem St U L Rev 483, 528 (1994); Maclin, When the Cure for the Fourth Amendment Is Worse Than the Disease, 68 S Cal L Rev 1, 9-12 (1994); L. Levy, Original Intent and the Framers' Constitution 221-246 (1988). Although, ironically, such warrants, writs, and statutes typically required individualized suspicion, see *,e.g.,* Cuddihy 1140 ("Typical of the American warrants of 1761-76 was Starke's 'tobacco' warrant, which commanded its bearer to 'enter any *suspected* Houses' ") (emphasis added), such requirements were subjective and largely unenforceable. Accordingly, these various forms of authority led in practice to "virtually unrestrained," and hence "general," searches. J. Landynski, Search and Seizure and the Supreme Court 20 (1966). To be sure, the Fourth Amendment, in the Warrant Clause, prohibits by name only searches by general warrants. But that was only because the abuses of the general warrant were particularly vivid in the minds of the Framers' generation, Cuddihy 1554-1560, and not because the Framers viewed other kinds of general searches as any less unreasonable. "Prohibition of the general warrant was part of a

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larger scheme to extinguish general searches categorically." *Id.,* at 1499.

More important, there is no indication in the historical materials that the Framers' opposition to general searches stemmed solely from the fact that they allowed officials to single out individuals for arbitrary reasons, and thus that officials could render them reasonable simply by making sure to extend their search to *every* house in a given area or to *every* person in a given group. See *Delaware* v *Prouse,* 440 US 648, 664, 59 L Ed 2d 660, 99 S Ct 1391 (1979) (Rehnquist, J., dissenting) (referring to this as the " 'misery loves company' " theory of the Fourth Amendment). On the contrary, although general searches were typically arbitrary, they were not invariably so. Some general searches, for example, were of the arguably evenhanded "door-to-door" kind. Cuddihy 1091; see also *id.,* at 377, 1502, 1557. Indeed, Cuddihy's descriptions of a few blanket searches suggest they may have been considered *more* worrisome than the typical general search. See *id.,* at 575 ("One type of warrant [between 1700 and 1760] went beyond a general search, in which the searcher entered and inspected suspicious places, by requiring him to search entire categories of places whether he suspected them or not"); *id.,* at 478 ("During the exigencies of Queen Anne's War, two colonies even authorized searches in 1706 that extended to entire geographic areas, not just to suspicious houses in a district, as conventional general warrants allowed").

Perhaps most telling of all, as reflected in the text of the Warrant Clause, the particular way the Framers chose to curb the abuses of general warrants—and by implication, *all* general searches—was not to impose a novel "evenhandedness" requirement; it was to retain the individualized suspicion requirement contained in the typical general warrant, but to make that requirement meaningful and enforceable, for instance, by raising the required level of individualized suspicion to objective probable cause. See US Const, Amdt 4. So, for example, when the same Congress that

[515 US 671]

proposed the

Fourth Amendment authorized duty collectors to search for concealed goods subject to import duties, specific warrants were required for searches on land; but even for searches at sea, where warrants were impractical and thus not required, Congress nonetheless limited officials to searching only those ships and vessels "in which [a collector] *shall have reason to suspect* any goods, wares or merchandise subject to duty shall be concealed." The Collection Act of July 31, 1789, § 24, 1 Stat 43 (emphasis added); see also Cuddihy 1490-1491 ("The Collection Act of 1789 was [the] most significant [of all early search statutes], for it identified the techniques of search and seizure that the framers of the amendment believed reasonable while they were framing it"). Not surprisingly, the *Carroll* Court relied on this statute and other subsequent ones like it in arriving at its views. See *Carroll,* 267 US, at 150-151, 154, 69 L Ed 543, 45 S Ct 280, 39 ALR 790; cf. Clancy, *supra,* at 489 ("While the plain language of the Amendment does not mandate individualized suspicion as a necessary component of all searches and seizures, the historical record demonstrates that the framers believed that individualized suspicion was an inherent quality of reasonable searches and seizures").

True, not all searches around the time the Fourth Amendment was adopted required individualized suspicion—although most did. A search incident to arrest was an obvious example of one that did not, see Cuddihy 1518, but even those searches shared the essential characteristics that distinguish suspicion-based searches from abusive general searches: they only "affec[t] one person at a time," *Krull,* 480 US, at 365, 94 L Ed 2d 364, 107 S Ct 1160 (O'Connor, J., dissenting), and they are generally avoidable by refraining from wrongdoing. See *supra,* at 667, 132 L Ed 2d, at 583. Protection of privacy, not evenhandedness, was then and is now the touchstone of the Fourth Amendment.

The view that mass, suspicionless searches, however evenhanded, are generally unreasonable remains inviolate in the criminal law enforcement context, see *Ybarra* v *Illinois,* 444

[515 US 672]

US 85, 62 L Ed 2d 238, 100 S Ct 338 (1979) (invalidating evenhanded, nonaccusatory patdown for weapons of all patrons in a tavern in which there was probable cause to think drug dealing was going on), at least where the search is more than minimally intrusive, see *Michigan Dept. of State Police* v *Sitz,* 496 US 444, 110 L Ed 2d 412, 110 S Ct 2481 (1990) (upholding the brief and easily avoidable detention, for purposes of observing signs of intoxication, of all motorists approaching a roadblock). It is worth noting in this regard that state-compelled, state-monitored collection and testing of urine, while perhaps not the most intrusive of searches, see, *e.g., Bell* v *Wolfish,* 441 US 520, 558-560, 60 L Ed 2d 447, 99 S Ct 1861 (1979) (visual body cavity searches), is still "particularly destructive of privacy and offensive to personal dignity." *Treasury Employees* v *Von Raab,* 489 US 656, 680, 103 L Ed 2d 685, 109 S Ct 1384 (1989) (Scalia, J., dissenting); see also *ante,* at 658, 132 L Ed 2d, at 577; *Skinner* v *Railway Labor Executives' Assn.,* 489 US 602, 617, 103 L Ed 2d 639, 109 S Ct 1402 (1989). We have not hesitated to treat monitored bowel movements as highly intrusive

(even in the special border search context), compare *United States* v *Martinez-Fuerte,* 428 US 543, 49 L Ed 2d 1116, 96 S Ct 3074 (1976) (brief interrogative stops of all motorists crossing certain border checkpoint reasonable without individualized suspicion), with *United States* v *Montoya de Hernandez,* 473 US 531, 87 L Ed 2d 381, 105 S Ct 3304 (1985) (monitored bowel movement of border crossers reasonable only upon reasonable suspicion of alimentary canal smuggling), and it is not easy to draw a distinction. See Fried, Privacy, 77 Yale L J 475, 487 (1968) ("[I]n our culture the excretory functions are shielded by more or less absolute privacy"). And certainly monitored urination combined with urine testing is more intrusive than some personal searches we have said trigger Fourth Amendment protections in the past. See, *e.g., Cupp* v *Murphy,* 412 US 291, 295, 36 L Ed 2d 900, 93 S Ct 2000 (1973) (Stewart, J.) (characterizing the scraping of dirt from under a person's fingernails as a " 'severe, though brief, intrusion upon cherished personal security' ") (citation omitted). Finally, the collection and testing of urine is, of course, a search of a person, one of only four categories of suspect

[515 US 673]

searches the Constitution mentions by name. See US Const, Amdt 4 (listing "persons, houses, papers, and effects"); cf. Cuddihy 835, 1518, 1552, n 394 (indicating long history of outrage at personal searches before 1789).

Thus, it remains the law that the police cannot, say, subject to drug testing every person entering or leaving a certain drug-ridden neighborhood in order to find evidence of crime. 3 W. LaFave, Search and Seizure § 9.5(b), pp 551-553 (2d ed 1987) (hereinafter LaFave). And this is true even though it is hard to think of a more compelling government interest than the need to fight the scourge of drugs on our streets and in our neighborhoods. Nor could it be otherwise, for if being evenhanded were enough to justify evaluating a search regime under an open-ended balancing test, the Warrant Clause, which presupposes that there is *some* category of searches for which individualized suspicion is nonnegotiable, see 2 LaFave § 4.1, at 118, would be a dead letter.

Outside the criminal context, however, in response to the exigencies of modern life, our cases have upheld several evenhanded blanket searches, including some that are more than minimally intrusive, after balancing the invasion of privacy against the government's strong need. Most of these cases, of course, are distinguishable insofar as they involved searches either not of a personally intrusive nature, such as searches of closely regulated businesses, see, *e.g., New York* v *Burger,* 482 US 691, 699-703, 96 L Ed 2d 601, 107 S Ct 2636 (1987); cf. Cuddihy 1501 ("Even the states with the strongest constitutional restrictions on general searches had long exposed commercial establishments to warrantless inspection"), or arising in unique contexts such as prisons, see, *e.g., Wolfish, supra,* at 558-560, 60 L Ed 2d 447, 99 S Ct 1861 (visual body cavity searches of prisoners following contact visits); cf. Cuddihy 1516-1519, 1552-1553 (indicating that searches incident to arrest and prisoner searches were the only common personal searches at time of founding). This certainly explains why Justice Scalia, in his dissent in our recent *Von Raab* decision, found it significant that "[u]ntil

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today this

Court had upheld a bodily search separate from arrest and without individualized suspicion of wrongdoing only with respect to prison inmates, relying upon the uniquely dangerous nature of that environment." *Von Raab, supra,* at 680, 103 L Ed 2d 685, 109 S Ct 1384 (citation omitted).

In any event, in many of the cases that can be distinguished on the grounds suggested above and, more important, in *all* of the cases that cannot, see, *e.g., Skinner, supra* (blanket drug testing scheme); *Von Raab, supra* (same); cf. *Camara v Municipal Court of City and County of San Francisco,* 387 US 523, 18 L Ed 2d 930, 87 S Ct 1727 (1967) (area-wide searches of private residences), we upheld the suspicionless search only after first recognizing the Fourth Amendment's longstanding preference for a suspicion-based search regime, and then pointing to sound reasons why such a regime would likely be ineffectual under the unusual circumstances presented. In *Skinner,* for example, we stated outright that " 'some quantum of individualized suspicion' " is "usually required" under the Fourth Amendment, *Skinner, supra,* at 624, 103 L Ed 2d 639, 109 S Ct 1402, quoting *Martinez-Fuerte, supra,* at 560, 49 L Ed 2d 1116, 96 S Ct 3074, and we built the requirement into the test we announced: "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion *would be placed in jeopardy by a requirement of individualized suspicion,* a search may be reasonable despite the absence of such suspicion," 489 US, at 624, 103 L Ed 2d 685, 109 S Ct 1384 (emphasis added). The obvious negative implication of this reasoning is that, if such an individualized suspicion requirement would *not* place the government's objectives in jeopardy, the requirement should not be forsaken. See also *Von Raab, supra,* at 665-666, 103 L Ed 2d 685, 109 S Ct 1384.

Accordingly, we upheld the suspicionless regime at issue in *Skinner* on the firm understanding that a requirement of individualized suspicion for testing train operators for drug or alcohol impairment following serious train accidents would be unworkable because "the scene of a serious rail

[515 US 675]

accident is chaotic." *Skinner,* 489 US, at 631, 103 L Ed 2d 639, 109 S Ct 1402. (Of course, it could be plausibly argued that the fact that testing occurred only *after* train operators were involved in serious train accidents amounted to an individualized suspicion requirement in all but name, in light of the record evidence of a strong link between serious train accidents and drug and alcohol use.) We have performed a similar inquiry in the other cases as well. See *Von Raab,* 489 US, at 674, 103 L Ed 2d 685, 109 S Ct 1384 (suspicion requirement for searches of customs officials for drug impairment impractical because "not feasible to subject [such] employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments"); *Camara, supra,* at 537, 18 L Ed 2d 930, 87 S Ct 1727 (suspicion requirement for searches of homes for safety code violations impractical because conditions such as "faulty wiring" not observable from outside of house); see also *Wolfish,* 441 US, at 559-560, n 40, 60 L Ed 2d 447, 99 S Ct 1861 (suspicion requirement for searches of prisoners for smuggling following contact visits impractical because observation necessary to

gain suspicion would cause "obvious disruption of the confidentiality and intimacy that these visits are intended to afford"); *Martinez-Fuerte*, 428 US, at 557, 49 L Ed 2d 1116, 96 S Ct 3074 ("A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens"); *United States* v *Edwards*, 498 F2d 496, 500 (CA2 1974) (Friendly, J.) (suspicion-based searches of airport passengers' carry-on luggage impractical because of the great number of plane travelers and "conceded inapplicability" of the profile method of detecting hijackers).

Moreover, an individualized suspicion requirement was often impractical in these cases because they involved situations in which even one undetected instance of wrongdoing could have injurious consequences for a great number of people. See, *e.g.*, *Camara*, *supra*, at 535, 18 L Ed 2d 930, 87 S Ct 1727 (even one safety code

[515 US 676]

violation can cause "fires and epidemics [that] ravage large urban areas"); *Skinner*, *supra*, at 628, 103 L Ed 2d 639, 109 S Ct 1402 (even one drug-or alcohol-impaired train operator can lead to the "disastrous consequences" of a train wreck, such as "great human loss"); *Von Raab*, *supra*, at 670, 674, 677, 103 L Ed 2d 685, 109 S Ct 1384 (even one customs official caught up in drugs can, by virtue of impairment, susceptibility to bribes, or indifference, result in the noninterdiction of a "sizable drug shipmen[t]," which eventually injures the lives of thousands, or to a breach of "national security"); *Edwards*, *supra*, at 500 (even one hijacked airplane can destroy " 'hundreds of human lives and millions of dollars of property' ") (citation omitted).

B

The instant case stands in marked contrast. One searches today's majority opinion in vain for recognition that history and precedent establish that individualized suspicion is "usually required" under the Fourth Amendment (regardless of whether a warrant and probable cause are also required) and that, in the area of intrusive personal searches, the only recognized exception is for situations in which a suspicion-based scheme would be likely ineffectual. See *supra*, at 674-675, 132 L Ed 2d, at 588-589, and this page. Far from acknowledging anything special about individualized suspicion, the Court treats a suspicion-based regime as if it were just any run-of-the-mill, less intrusive alternative—that is, an alternative that officials may bypass if the lesser intrusion, in their reasonable estimation, is outweighed by policy concerns unrelated to practicability.

As an initial matter, I have serious doubts whether the Court is right that the District reasonably found that the lesser intrusion of a suspicion-based testing program outweighed its genuine concerns for the adversarial nature of such a program, and for its abuses. See *ante*, at 663-664, 132 L Ed 2d, at 581. For one thing, there are significant safeguards against abuses. The fear that a suspicion-based regime will lead to the testing of "troublesome but not drug-likely" students,

[515 US 677]

ante, at 663, 132 L Ed 2d, at 581, for example, ignores that the required level of suspicion in the school context is objectively *reason-*

able suspicion. In this respect, the facts of our decision in *New Jersey* v *T. L. O.*, 469 US 325, 83 L Ed 2d 720, 105 S Ct 733 (1985), should be reassuring. There, we found reasonable suspicion to search a ninth-grade girl's purse for cigarettes after a teacher caught the girl smoking in the bathroom with a companion who admitted it. See *id.*, at 328, 345-346, 83 L Ed 2d 720, 105 S Ct 733. Moreover, any distress arising from what turns out to be a false accusation can be minimized by keeping the entire process confidential.

For another thing, the District's concern for the adversarial nature of a suspicion-based regime (which appears to extend even to those who are *rightly* accused) seems to ignore the fact that such a regime would not exist in a vacuum. Schools already have adversarial, disciplinary schemes that require teachers and administrators in many areas besides drug use to investigate student wrongdoing (often by means of accusatory searches); to make determinations about whether the wrongdoing occurred; and to impose punishment. To such a scheme, suspicion-based drug testing would be only a minor addition. The District's own elaborate disciplinary scheme is reflected in its handbook, which, among other things, lists the following disciplinary "problem areas" carrying serious sanctions: "DEFIANCE OF AUTHORITY," "DISORDERLY OR DISRUPTIVE CONDUCT INCLUDING FOUL LANGUAGE," "AUTOMOBILE USE OR MISUSE," "FORGERY OR LYING," "GAMBLING," "THEFT," "TOBACCO," "MISCHIEF," "VANDALISM," "RECKLESSLY ENDANGERING," "MENACING OR HARASSMENT," "ASSAULT," "FIGHTING," "WEAPONS," "EXTORTION," "EXPLOSIVE DEVICES," and "ARSON." Record, Exh. 2, p 11; see also *id.*, at 20-21 (listing rules regulating dress and grooming, public displays of affection, and the wearing of hats inside); cf. *id.*, at 8 ("RESPONSIBILITIES OF SCHOOLS" include "To develop and distribute to parents and students reasonable rules

[515 US 678]

and regulations governing student behavior and attendance" and "To provide fair and reasonable standards of conduct and to enforce those standards through appropriate disciplinary action"). The high number of disciplinary referrals in the record in this case illustrates the District's robust scheme in action.

In addition to overstating its concerns with a suspicion-based program, the District seems to have *understated* the extent to which such a program is less intrusive of students' privacy. By invading the privacy of a few students rather than many (nationwide, of thousands rather than millions), and by giving potential search targets substantial control over whether they will, in fact, be searched, a suspicion-based scheme is *significantly* less intrusive.

In any event, whether the Court is right that the District reasonably weighed the lesser intrusion of a suspicion-based scheme against its policy concerns is beside the point. As stated, a suspicion-based search regime is not just any less intrusive alternative; the individualized suspicion requirement has a legal pedigree as old as the Fourth Amendment itself, and it may not be easily cast aside in the name of policy concerns. It may only be forsaken, our cases in the personal search context

have established, if a suspicion-based regime would likely be ineffectual.

But having misconstrued the fundamental role of the individualized suspicion requirement in Fourth Amendment analysis, the Court never seriously engages the practicality of such a requirement in the instant case. And that failure is crucial because nowhere is it *less* clear that an individualized suspicion requirement would be ineffectual than in the school context. In most schools, the entire pool of potential search targets—students—is under constant supervision by teachers and administrators and coaches, be it in classrooms, hallways, or locker rooms. See *T. L. O.*, 469 US, at 339, 83 L Ed 2d 720, 105 S Ct 733 ("[A] proper educational environment requires close supervision of schoolchildren").

[515 US 679]

The record here indicates that the Vernonia schools are no exception. The great irony of this case is that most (though not all) of the evidence the District introduced to justify its suspicionless drug testing program consisted of first-or second-hand stories of particular, identifiable students acting in ways that plainly gave rise to reasonable suspicion of in-school drug use—and thus that would have justified a drug-related search under our *T. L. O.* decision. See *id.*, at 340-342, 83 L Ed 2d 720, 105 S Ct 733 (warrant and probable cause not required for school searches; reasonable suspicion sufficient). Small groups of students, for example, were observed by a teacher "passing joints back and forth" across the street at a restaurant before school and during school hours. Tr 67 (Apr. 29, 1992). Another group was caught skipping school and using drugs at one of the students' houses. See *id.*, at 93-94. Several students actually *admitted* their drug use to school officials (some of them being caught with marijuana pipes). See *id.*, at 24. One student presented himself to his teacher as "clearly obviously inebriated" and had to be sent home. *Id.*, at 68. Still another was observed dancing and singing at the top of his voice in the back of the classroom; when the teacher asked what was going on, he replied, "Well, I'm just high on life." *Id.*, at 89-90. To take a final example, on a certain road trip, the school wrestling coach smelled marijuana smoke in a motel room occupied by four wrestlers, see *id.*, at 110-112, an observation that (after some questioning) would probably have given him reasonable suspicion to test one or all of them. Cf. 4 LaFave § 10.11(b), at 169 ("[I]n most instances the evidence of wrongdoing prompting teachers or principals to conduct searches is sufficiently detailed and specific to meet the traditional probable cause test").

In light of all this evidence of drug use by particular students, there is a substantial basis for concluding that a vigorous regime of suspicion-based testing (for which the District appears already to have rules in place, see Record, Exh. 2, at 14, 17) would have gone a long way toward solving Vernonia's

[515 US 680]

school drug problem while preserving the Fourth Amendment rights of James Acton and others like him. And were there any doubt about such a conclusion, it is removed by indications in the record that suspicion-based testing could have been supplemented by an equally vigorous campaign to have Vernonia's parents encourage their children to submit to the District's *voluntary* drug testing program. See

id., at 32 (describing the voluntary program); *ante*, at 665, 132 L Ed 2d, at 582 (noting widespread parental support for drug testing). In these circumstances, the Fourth Amendment dictates that a mass, suspicionless search regime is categorically unreasonable.

I recognize that a suspicion-based scheme, even where reasonably effective in controlling in-school drug use, may not be *as* effective as a mass, suspicionless testing regime. In one sense, that is obviously true—just as it is obviously true that suspicion-based law enforcement is not as effective as mass, suspicionless enforcement might be. "But there is nothing new in the realization" that Fourth Amendment protections come with a price. *Arizona* v *Hicks*, 480 US 321, 329, 94 L Ed 2d 347, 107 S Ct 1149 (1987). Indeed, the price we pay is higher in the criminal context, given that police do not closely observe the entire class of potential search targets (all citizens in the area) and must ordinarily adhere to the rigid requirements of a warrant and probable cause.

The principal counterargument to all this, central to the Court's opinion, is that the Fourth Amendment is more lenient with respect to school searches. That is no doubt correct, for, as the Court explains, *ante*, at 655-656, 132 L Ed 2d, at 575-576, schools have traditionally had special guardianlike responsibilities for children that necessitate a degree of constitutional leeway. This principle explains the considerable Fourth Amendment leeway we gave school officials in *T. L. O.* In that case, we held that children at school do not enjoy two of the Fourth Amendment's traditional categorical protections against unreasonable searches and seizures: the warrant requirement

[515 US 681]

and the probable cause requirement. See *T. L. O.*, 469 US, at 337-343, 83 L Ed 2d 720, 105 S Ct 733. And this was true even though the same children enjoy such protections "in a nonschool setting." *Id.*, at 348, 83 L Ed 2d 720, 105 S Ct 733 (Powell, J., concurring).

The instant case, however, asks whether the Fourth Amendment is even more lenient than that, *i.e.*, whether it is *so* lenient that students may be deprived of the Fourth Amendment's only remaining, and most basic, categorical protection: its strong preference for an individualized suspicion requirement, with its accompanying antipathy toward personally intrusive, blanket searches of mostly innocent people. It is not at all clear that people in *prison* lack this categorical protection, see *Wolfish*, 441 US, at 558-560, 60 L Ed 2d 447, 99 S Ct 1861 (upholding certain suspicionless searches of prison inmates); but cf. *supra*, at 675, 132 L Ed 2d, at 588 (indicating why suspicion requirement was impractical in *Wolfish*), and we have said "[W]e are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment." *T. L. O., supra*, at 338-339, 83 L Ed 2d 720, 105 S Ct 733. Thus, if we are to mean what we often proclaim—that students do not "shed their constitutional rights . . . at the schoolhouse gate," *Tinker* v *Des Moines Independent Community School Dist.*, 393 US 503, 506, 21 L Ed 2d 731, 89 S Ct 733 (1969)—the answer must plainly be no.[1]

1. The Court says I pay short shrift to the original meaning of the Fourth Amendment as it relates to searches of public school children. See *ante*, at 665, n 4, 132 L Ed 2d, at 582. As an

[515 US 682]

For the contrary position, the Court relies on cases such as *T. L. O.*, *Ingraham* v *Wright*, 430 US 651, 51 L Ed 2d 711, 97 S Ct 1401 (1977), and *Goss* v *Lopez*, 419 US 565, 42 L Ed 2d 725, 95 S Ct 729 (1975). See *ante*, at 655-656, 132 L Ed 2d, at 575-576. But I find the Court's reliance on these cases ironic. If anything, they affirm that schools have substantial constitutional leeway in carrying out their traditional mission of responding to *particularized* wrongdoing. See *T. L. O.*, *supra* (leeway in investigating particularized wrongdoing); *Ingraham*, *supra* (leeway in punishing particularized wrongdoing); *Goss*, *supra* (leeway in choosing procedures by which particularized wrongdoing is punished).

By contrast, intrusive, blanket searches of schoolchildren, most of whom are innocent, for evidence of serious wrongdoing are not part of any traditional school function of which I am aware. Indeed, many schools, like many parents, prefer to trust their children unless given reason to do otherwise. As James Acton's father said on the witness stand, "[suspicionless testing] sends a message to children that are trying to be responsible citizens . . . that they have to prove that they're innocent . . . , and I think that kind of sets a bad tone for citizenship." Tr 9 (Apr. 29, 1992).

I find unpersuasive the Court's reliance, *ante*, at 656-657, 132 L Ed 2d, at 576-577, on the widespread practice of physical examinations and vaccinations, which are both blanket searches of a sort. Of course, for these practices to have *any* Fourth Amendment significance, the Court has to assume that these physical exams and vaccinations are typically "required" to a similar extent that urine testing and collection is required in the instant case, *i.e.*, that they are required regardless of parental

[515 US 683]

objection and that some meaningful sanction attaches to the failure to submit. In any event, without forming any particular view of such searches, it is worth noting that a suspicion requirement for vaccinations is not merely impractical; it is nonsensical, for vaccinations are not searches *for anything in particular* and so there is nothing about which to be suspicious. Nor is this saying anything new; it is the same theory on which, in part, we have repeatedly upheld certain inventory searches. See, *e.g.*, *South Dakota* v *Opperman*, 428 US 364, 370, n 5, 49 L Ed 2d 1000, 96 S Ct 3092 (1976) ("The probable-cause approach is unhelpful when analysis centers

initial matter, the historical materials on what the Framers thought of official searches of children, let alone of public school children (the concept of which did not exist at the time, see *ante*, at 652, n 1, 132 L Ed 2d, at 574), are extremely scarce. Perhaps because of this, the Court does not itself offer an account of the original meaning, but rather resorts to the general proposition that children had fewer recognized rights at the time of the framing than they do today. But that proposition seems uniquely unhelpful in the present case, for although children may have had fewer rights against the private schoolmaster at the time of the framing than they have against public school officials today, *parents* plainly had *greater* rights then than now. At the time of the framing, for example, the fact that a child's parents refused to authorize a private schoolmaster's search of the child would probably have rendered any such search unlawful; after all, at common law, the source of the schoolmaster's authority over a child was a delegation of the parent's authority. See *ante*, at 654-655, 132 L Ed 2d, at 575. Today, of course, the fact that a child's parents refuse to authorize a public school search of the child—as James Acton's parents refused here—is of little constitutional moment. Cf. *Ingraham* v *Wright*, 430 US 651, 662, n. 22, 51 L Ed 2d 711, 97 S Ct 1401 (1977) ("[P]arental approval of corporal punishment is not constitutionally required").

upon the reasonableness of routine administrative caretaking functions"). As for physical examinations, the practicability of a suspicion requirement is highly doubtful because the conditions for which these physical exams ordinarily search, such as latent heart conditions, do not manifest themselves in observable behavior the way school drug use does. See *supra*, at 678-680, 132 L Ed 2d, at 590-592.

It might also be noted that physical exams (and of course vaccinations) are not searches for conditions that reflect wrongdoing on the part of the student, and so are *wholly* nonaccusatory and have no consequences that can be regarded as punitive. These facts may explain the absence of Fourth Amendment challenges to such searches. By contrast, although I agree with the Court that the accusatory nature of the District's testing program is *diluted* by making it a blanket one, any testing program that searches for conditions plainly reflecting serious wrongdoing can never be made wholly nonaccusatory from the student's perspective, the motives for the program notwithstanding; and for the same reason, the substantial consequences that can flow from a positive test, such as suspension from sports, are invariably—and quite reasonably—understood as punishment. The best proof that the District's testing program is to *some* extent accusatory can be found in James Acton's own explanation on the witness stand as to why he did not want to submit to drug testing: "Because I feel that they have no

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reason to think I was taking drugs." Tr 13 (Apr. 29, 1992). It is hard to think of a manner of explanation that resonates more intensely in our Fourth Amendment tradition than this.

II

I do not believe that suspicionless drug testing is justified on these facts. But even if I agreed that some such testing were reasonable here, I see two other Fourth Amendment flaws in the District's program.[2] First, and most serious, there is virtually no evidence in the record of a drug problem at the Washington Grade School, which includes the seventh and eighth grades, and which Acton attended when this litigation began. This is not surprising, given that, of the four witnesses who testified to drug-related incidents, three were teachers and/or coaches at the high school, see Tr 65; *id.*, at 86; *id.*, at 99, and the fourth, though the principal of the grade school at the time of the litigation, had been employed as principal of the high school during the years leading up to (and beyond) the implementation of the drug testing policy. See *id.*, at 17. The only evidence of a grade school drug problem that my review of the record uncovered is a "guarantee" by the late-arriving grade school principal that "our problems we've had in '88 and '89 didn't start at the high school level. They started in the elementary school." *Id.*, at 43. But I would hope that a single assertion of this sort would not serve as an adequate basis on which to uphold mass, suspicionless drug testing of two entire grades of student athletes—in Vernonia

2. Because I agree with the Court that we may assume the District's program allows students to confine the advanced disclosure of highly personal prescription medications to the testing lab, see *ante*, at 660, 132 L Ed 2d, at 579, I also agree that *Skinner* controls this aspect of the case, and so do not count the disclosure requirement among the program's flaws.

and, by the Court's reasoning, in other school districts as well. Perhaps there is a drug problem at the grade school, but one would not know it from this

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record. At the least, then, I would insist that the parties and the District Court address this issue on remand.

Second, even as to the high school, I find unreasonable the school's choice of student athletes as the class to subject to suspicionless testing—a choice that appears to have been driven more by a belief in what would pass constitutional muster, see *id.*, at 45-47 (indicating that the original program was targeted at students involved in any extracurricular activity), than by a belief in what was required to meet the District's principal disciplinary concern. Reading the full record in this case, as well as the District Court's authoritative summary of it, 796 F Supp 1354, 1356-1357 (Or 1992), it seems quite obvious that the true driving force behind the District's adoption of its drug testing program was the need to combat the rise in drug-related disorder and disruption in its classrooms and around campus. I mean no criticism of the strength of that interest. On the contrary, where the record demonstrates the existence of such a problem, that interest seems self-evidently compelling. "Without first establishing discipline and maintaining order, teachers cannot begin to educate their students." *T. L. O.*, 469 US, at 350, 83 L Ed 2d 720, 105 S Ct 733 (Powell, J., concurring). And the record in this case surely demonstrates there was a drug-related discipline problem in Vernonia of " 'epidemic proportions.' " 796 F Supp, at 1357. The evidence of a drug-related sports injury problem at Vernonia, by contrast, was considerably weaker.

On this record, then, it seems to me that the far more reasonable choice would have been to focus on the class of students found to have violated published school rules against severe disruption in class and around campus, see Record, Exh. 2, at 9, 11—disruption that had a strong nexus to drug use, as the District established at trial. Such a choice would share two of the virtues of a suspicion-based regime: testing dramatically fewer students, tens as against hundreds, and giving students control, through their behavior,

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over the likelihood that they would be tested. Moreover, there would be a reduced concern for the accusatory nature of the search, because the Court's feared "badge of shame," *ante,* at 663, 132 L Ed 2d, at 581, would already exist, due to the antecedent accusation and finding of severe disruption. In a lesser known aspect of *Skinner,* we upheld an analogous testing scheme with little hesitation. See *Skinner*, 489 US, at 611, 103 L Ed 2d 639, 109 S Ct 1402 (describing " 'Authorization to Test for Cause' " scheme, according to which train operators would be tested "in the event of certain specific rule violations, including noncompliance with a signal and excessive speeding").

III

It cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis. But we must also stay mindful that not all government responses to such times are hysterical overreactions; some crises are quite real, and when they are, they serve precisely as the compelling state interest that

we have said may justify a measured intrusion on constitutional rights. The only way for judges to mediate these conflicting impulses is to do what they should do anyway: stay close to the record in each case that appears before them, and make their judgments based on that alone. Having reviewed the record here, I cannot avoid the conclusion that the District's suspicionless policy of testing all student athletes sweeps too broadly, and too imprecisely, to be reasonable under the Fourth Amendment.

EDITOR'S NOTE

An annotation on "Taking of individual's bodily fluid or material for analysis or comparison as violating individual's rights under Federal Constitution—Supreme Court cases," appears p 1021, infra.

[429 US 589]

ROBERT P. WHALEN, as Commissioner of Health of New York, Appellant,

v

RICHARD ROE, an infant by Robert Roe, his parent, et al.

429 US 589, 51 L Ed 2d 64, 97 S Ct 869

[No. 75-839]

Argued October 13, 1976. Decided February 22, 1977.

SUMMARY

Challenging the constitutionality of a New York statute which requires that physicians identify patients obtaining prescription drugs of the statute's "Schedule II" category (a class of drugs having a potential for abuse and also a recognized medical use), so that names and addresses of the prescription drug patients can be recorded in a centralized computer file maintained by the New York State Department of Health, patients regularly receiving prescriptions for "Schedule II" drugs and doctors who prescribe such drugs brought an action in the United States District Court for the Southern District of New York. Ultimately, a three-judge District Court, holding that New York had been unable to demonstrate the necessity for the statute's patient identification requirement, enjoined enforcement of the provisions which require recording on the ground that the provisions violated the plaintiffs' constitutionally protected rights of privacy (403 F Supp 931).

On direct appeal, the United States Supreme Court reversed. In an opinion by STEVENS, J., expressing the unanimous view of the court, it was held that (1) the patient identification requirement, having been the product of an orderly and rational legislative decision, constituted a reasonable exercise of the state's broad police powers, and the District Court's finding that the necessity for the requirement had not been proved was an insufficient reason for holding the statutory requirement unconstitutional, (2) the statute, on its face, did not impair any privacy interest in avoiding the disclosure of personal matters or any privacy interest in making independent decisions as to drug use, such as to constitute an invasion of any right or liberty protected by the Fourteenth Amendment, and (3) the statute did not impair the right of physicians prescribing "Schedule II" drugs to practice medicine free of unwarranted state interference.

Briefs of Counsel, p 821, infra.

BRENNAN, J., concurring, expressed the view that (1) broad dissemination by state officials of the patient identification information disclosed by physicians would implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests, (2) the statute's provisions for computer storage, on their face, did not amount to a deprivation of a constitutionally protected privacy interest due to the state's successful effort to prevent abuse and limit access, and (3) in the absence of a deprivation of a constitutionally protected privacy interest, New York was not required to prove that the challenged statute was absolutely necessary to its attempt to control drug abuse.

STEWART, J., concurred, with the understanding that the court had not departed from the view that there was no general constitutional right to privacy.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

25 AM JUR 2d, Drugs, Narcotics, and Poisons §§ 16, 17; 61 AM JUR 2d, Physicians, Surgeons, and Other Healers §§ 88, 101; 62 AM JUR 2d, Privacy § 42

20 AM JUR PL & PR FORMS (Rev Ed), Privacy, Forms 1 et seq.

USCS, Constitution, 14th Amendment

US L ED DIGEST, Constitutional Law §§ 526, 895, 906; Physicians and Surgeons § 2

ALR DIGESTS, Constitutional Law §§ 552.5, 748; Physicians and Surgeons § 24

L ED INDEX TO ANNOS, Food and Drugs; Physicians and Surgeons; Police Power; Privacy

ALR QUICK INDEX, Drugs and Narcotics; Physicians and Surgeons; Police Power; Privacy

FEDERAL QUICK INDEX, Drugs, Narcotics, and Poisons; Physicians and Surgeons; Police Power; Privacy

ANNOTATION REFERENCES

Supreme Court's views as to concept of "liberty" under due process clauses of Fifth and Fourteenth Amendments. 47 L Ed 2d 975.

Supreme Court's views as to the federal legal aspects of the right of privacy. 43 L Ed 2d 871.

Right of privacy. 138 ALR 22, 168 ALR 446, 14 ALR2d 750.

HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

Constitutional Law § 906; Courts § 147 — identification of prescription drug patients — state law — police power — necessity

1a, 1b. State legislation requiring the identification of all persons who obtain, pursuant to a doctor's prescription, certain drugs for which there is both a lawful and unlawful market, so that such persons' names and addresses might be recorded in a centralized computer file, having been the product of an orderly and rational legislative decision, constitutes a reasonable exercise of the state's broad police powers; thus, a finding by a court that the necessity for the identification requirement had not been proved is an insufficient reason for holding the statutory requirement unconstitutional.

Constitutional Law § 526 — privacy interests — state legislation — identification of prescription drug patients

2a, 2b. On its face, state legislation requiring the identification by physicians of persons who obtain, pursuant to a prescription, certain drugs for which there is both a lawful and an unlawful market, so that the names and addresses of the persons may be recorded in a centralized computer file maintained by the state's health department, does not impair any privacy interest in avoiding the disclosure of personal matters or any privacy interest in making important decisions independently—on the theory, set forth by patients receiving such drugs and prescribing doctors, that the concern that readily available information about patients' drug use would become publicly known and adversely affect patients' reputations makes patients reluctant to use and doctors reluctant to prescribe the drugs—such as to constitute an invasion of any right or liberty protected by the Fourteenth Amendment, where (1) with respect to the interest in avoiding the disclosure of personal matters, (a) it could not be assumed that the security provisions of the legislation, prohibiting the public disclosure of the identity of patients, would be administered improperly, (b) it was a remote possibility that if the stored data were offered in evidence in a judicial proceeding, judicial supervision of the evidentiary use of stored information would be inadequate to protect against unwarranted disclosures, and (c) requiring the disclosure of private medical information to authorized employees of the state's health department does not automatically amount to an impermissible invasion of privacy, and (2) with respect to the interest in making important decisions independently, although some use of the drugs had been discouraged by the concern that information was available in the computerized file, the legislation did not deprive the public of access to the drugs, and the state had neither prohibited entirely the use of the drugs, nor required access to the drugs to be conditioned on the consent of any state official or other third party, but had left the decision to prescribe or use the drugs entirely to the physician and patient.

Physicians and Surgeons § 2 — state legislation — identification of prescription drug patients — interference with medical practice

3a, 3b. State legislation requiring physicians and pharmacists to identify persons who obtain, pursuant to a doctor's prescription, certain drugs for which there is both a lawful and an unlawful market, so that the names and addresses of the persons may be recorded in a centralized computer file, does not impair the right of physicians prescribing such drugs to practice medicine free of unwarranted state interference.

Courts § 99; Privacy § 1 — constitutionality of legislation — necessity — experimentation on local problems

4. State legislation which has some effect on individual liberty or privacy

may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part, since individual states have broad latitude in experimenting with possible solutions to problems of vital local concern.

Courts §§ 99, 103.5 — legislation — Supreme Court's concerns

5a, 5b. The United States Supreme Court is not concerned with the wisdom, need, or appropriateness of legislation.

States § 7 — Constitution — limitation on legislation

6a, 6b. Nothing in the United States Constitution prohibits a state from reaching a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.

Search and Seizure § 7 — Fourth Amendment — governmental surveillance and intrusion

7a, 7b. The right of the individual to be free in his private affairs from governmental surveillance and intrusion is directly protected by the Fourth Amendment.

Evidence § 703 — privilege — physician-patient privilege

8a, 8b. The physician-patient evidentiary privilege is unknown to the common law.

Constitutional Law §§ 895, 906 — state regulation of drugs — police power

9a, 9b. A state can prohibit entirely the use of particular drugs for which there is both a lawful and an unlawful market; the state has broad police powers in regulating the administration of drugs by the health professions.

SYLLABUS BY REPORTER OF DECISIONS

Responding to a concern that drugs were being diverted into unlawful channels, the New York Legislature in 1972 enacted a statutory scheme to correct defects in the previous law. The 1972 statute classifies potentially harmful drugs and provides that prescriptions for the category embracing the most dangerous legitimate drugs (Schedule II) be prepared on an official form. One copy of the form, which requires identification of the prescribing physician, dispensing pharmacy, drug and dosage, and the patient's name, address, and age, must be filed with the state health department, where pertinent data are recorded on tapes for computer processing. All forms are retained for a five-year period under a system to safeguard their security, and are thereafter destroyed. Public disclosure of the patient's identity is prohibited, and access to the files is confined to a limited number of health department and investigatory personnel. Appellees, including a group of patients regularly receiving Schedule II drugs and prescribing doctors, brought this action challenging the constitutionality of the Schedule II patient-identification requirements. Holding that "the doctor-patient relationship is one of the zones of privacy accorded constitutional protection" and that the Act's patient-identification provisions invaded that zone with "a needlessly broad sweep," since appellants had been unable to demonstrate the need for those requirements, a three-judge District Court enjoined the enforcement of the challenged provisions. *Held:*

1. The patient-identification requirement is a reasonable exercise of the State's broad police powers, and the District Court's finding that the necessity for the requirement had not been proved is not a sufficient reason for holding the statute unconstitutional.

2. Neither the immediate nor the threatened impact of the patient identification requirement on either the reputation or the independence of patients for whom Schedule II drugs are medically indicated suffices to constitute an invasion of any right or liberty protected by the Fourteenth Amendment.

(a) The possibility that a doctor or pharmacist may voluntarily reveal information on a prescription form, which

existed under prior law, is unrelated to the computerized data bank.

(b) There is no support in the record or in the experience of the two States that the New York program emulates for assuming that the statute's security provisions will be improperly administered.

(c) The remote possibility that judicial supervision of the evidentiary use of particular items of stored information will not provide adequate protection against unwarranted disclosure is not a sufficient reason for invalidating the entire patient identification program.

(d) Though it is argued that concern about disclosure may induce patients to refuse needed medication, the 1972 statute does not deprive the public of access to Schedule II drugs, as is clear from the fact that about 100,000 prescriptions for such drugs were filed each month before the District Court's injunction was entered.

3. Appellee doctors' contention that the 1972 statute impairs their right to practice medicine free from unwarranted state interference is without merit, whether it refers to the statute's impact on their own procedures, which is no different from the impact of the prior statute, or refers to the patients' concern about disclosure that the Court has rejected (see 2 (d), supra).

403 F Supp 931, reversed.

Stevens, J., delivered the opinion for a unanimous Court. Brennan, J., post, p 605, 51 L Ed 2d, p 77, and Stewart, J., post, p 607, 51 L Ed 2d, p 78, filed concurring opinions.

APPEARANCES OF COUNSEL

A. Seth Greenwald argued the cause for appellant.

Michael O. Lesch and **H. Miles Jaffe** argued the cause for appellees.

Briefs of Counsel, p 821, infra.

OPINION OF THE COURT

[429 US 591]

Mr. Justice **Stevens** delivered the opinion of the Court.

[1a, 2a, 3a] The constitutional question presented is whether the State of New York may record, in a centralized computer file, the names and addresses of all persons who have obtained, pursuant to a doctor's prescription, certain drugs for which there is both a lawful and an unlawful market.

The District Court enjoined enforcement of the portions of the New York State Controlled Substances Act of 1972[1] which require such recording on the ground that they violate appellees' constitutionally protected rights of privacy.[2] We noted probable jurisdiction of the appeal by the Commissioner of Health, 424 US 907, 47 L Ed 2d 310, 96 S Ct 1100, and now reverse.[3]

Many drugs have both legitimate and illegitimate uses. In response to a concern that such drugs were being diverted into unlawful channels, in 1970 the New York Legislature created a special commission to eval-

1. 1972 NY Laws, c 878; NY Pub Health Law § 3300 et seq. (McKinney, Supp 1976–1977) (hereafter Pub Health Law, except as indicated in n 13, infra).

2. Roe v Ingraham, 403 F Supp 931 (SDNY 1975). Earlier the District Court had dismissed the complaint for want of a substantial federal question. Roe v Ingraham, 357 F Supp 1217 (1973). The Court of Appeals reversed, holding that a substantial constitutional question was presented and therefore a three-judge court was required. Roe v Ingraham, 480 F2d 102 (CA2 1973).

3. Jurisdiction is conferred by 28 USC §§ 1253, 2101(b) [28 USCS §§ 1253, 2101(b)].

uate the State's drug-control laws.[4] The commission found the existing laws deficient

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in several respects. There was no effective way to prevent the use of stolen or revised prescriptions, to prevent unscrupulous pharmacists from repeatedly refilling prescriptions, to prevent users from obtaining prescriptions from more than one doctor, or to prevent doctors from overprescribing, either by authorizing an excessive amount in one prescription or by giving one patient multiple prescriptions.[5] In drafting new legislation to correct such defects, the commission consulted with enforcement officials in California and Illinois where central reporting systems were being used effectively.[6]

The new New York statute classified potentially harmful drugs in five schedules.[7] Drugs, such as heroin, which are highly abused and have no recognized medical use, are in Schedule I; they cannot be prescribed. Schedules II through V include drugs which have a progressively lower potential for abuse but also have a recognized medical use. Our

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concern is limited to Schedule II, which includes the most dangerous of the legitimate drugs.[8]

With an exception for emergencies, the Act requires that all prescriptions for Schedule II drugs be prepared by the physician in triplicate on an official form.[9] The completed form identifies the prescribing physician; the dispensing pharmacy; the drug and dosage; and the name, address and age of the patient. One copy of the form is retained by the physician, the second by the pharmacist, and the third is forwarded to the New York State Department of Health in Albany. A prescription made on an official form may not

4. NY Laws 1970, c 474, amended by NY Laws 1971, c 7. The Temporary State Commission to Evaluate the Drug Laws (hereafter TSC) issued two reports which, it is stipulated, constitute part of the legislative history of the Act. The reports are the Interim Report of the Temporary State Commission to Evaluate the Drug Laws (State of New York, Legislative Doc No. 10, Jan. 1972); and the Second Interim Report of the Temporary State Commission to Evaluate the Drug Laws (Albany, N. Y., Apr. 5, 1971).

5. Id., at 3-5.

6. The Chairman of the Temporary State Commission summarized its findings:

"Law enforcement officials in both California and Illinois have been consulted in considerable depth about the use of multiple prescriptions, since they have been using them for a considerable period of time. They indicate to us that they are not only a useful adjunct to the proper identification of culpable professional and unscrupulous drug abusers, but that they also give a reliable statistical indication of the pattern of drug flow throughout their states: information sorely needed in this state to stem the tide of diversion of lawfully manufactured controlled substances." Memorandum of Chester R. Hardt, App 87a-88a.

TSC Interim Report 21; TSC Second Interim Report 27-44. Cal Health and Safety Code §§ 11158, 11160, 11167 (West, 1975 and Supp 1976); Ill Ann Stat c 56½, §§ 1308, 1311, 1312(a) (Supp 1977).

7. These five schedules conform in all material aspects with the drug schedules in the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970. 21 USC §§ 801 et seq. [21 USCS §§ 801 et seq.].

8. These include opium and opium derivatives, cocaine, methadone, amphetamines, and methaqualone. Pub Health Law § 3306. These drugs have accepted uses in the amelioration of pain and in the treatment of epilepsy, narcolepsy, hyperkinesia, schizo-affective disorders, and migraine headaches.

9. Pub Health Law §§ 3334, 3338. These forms are prepared and issued by the Department of Health, numbered serially, in groups of 100 forms at $10 per group (10 cents per triplicate form). New York State Health Department—Official New York State Prescription, Form NC-77 (8/72).

exceed a 30-day supply, and may not be refilled.[10]

The District Court found that about 100,000 Schedule II prescription forms are delivered to a receiving room at the Department of Health in Albany each month. They are sorted, coded, and logged and then taken to another room where the data on the forms is recorded on magnetic tapes for processing by a computer. Thereafter, the forms are returned to the receiving room to be retained in a vault for a five-year period and then destroyed as required by the statute.[11]

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The receiving room is surrounded by a locked wire fence and protected by an alarm system. The computer tapes containing the prescription data are kept in a locked cabinet. When the tapes are used, the computer is run "off-line," which means that no terminal outside of the computer room can read or record any information. Public disclosure of the identity of patients is expressly prohibited by the statute and by a Department of Health regulation.[12] Willful violation

[429 US 595]

of these prohibitions is a crime punishable by up to one year in prison and a $2,000 fine.[13] At the time of trial there were 17 Department of Health employees with access to the files; in addition, there were 24 investigators with authority to investigate cases of overdispensing which might be identified

10. Pub Health Law §§ 3331–3333, 3339. The pharmacist normally forwards the prescription to Albany after filling it. If the physician dispenses the drug himself, he must forward two copies of the prescription to the Department of Health, § 3331(6).

11. Pub Health Law § 3370(3), NY Laws 1974, c 965, § 16. The physician and the pharmacist are required to retain their copies for five years also, Pub Health Law §§ 3331(6), 3332(4), 3333(4), but they are not required to destroy them.

12. Section 3371 of the Pub Health Law states:

"1. No person, who has knowledge by virtue of his office of the identity of a particular patient or research subject, a manufacturing process, a trade secret or a formula shall disclose such knowledge, or any report or record thereof, except:

"(a) to another person employed by the department, for purposes of executing provisions of this article; or

"(b) pursuant to judicial subpoena or court order in a criminal investigation or proceeding; or

"(c) to an agency, department of government, or official board authorized to regulate, license or otherwise supervise a person who is authorized by this article to deal in controlled substances, or in the course of any investigation or proceeding by or before such agency, department or board; or

"(d) to a central registry established pursuant to this article.

"2. In the course of any proceeding where such information is disclosed, except when necessary to effectuate the rights of a party to the proceeding, the court or presiding officer shall take such action as is necessary to insure that such information, or record or report of such information is not made public."

Pursuant to its statutory authority, the Department of Health has promulgated regulations in respect of confidentiality as follows:

"No person who has knowledge by virtue of his office of the identity of a particular patient or research subject, a manufacturing process, a trade secret or a formula shall disclose such knowledge, or any report or record thereof, except:

"(a) to another person who by virtue of his office as an employee of the department is entitled to obtain such information; or

"(b) pursuant to judicial subpoena or court order in a criminal investigation or proceedings; or

"(c) to an agency, department of government, or official board authorized to regulate, license or otherwise supervise a person who is authorized by article 33 of the Public Health Law to deal in controlled substances, or in the course of any investigation or proceeding by or before such agency, department or board; or

"(d) to a central registry established pursuant to article 33 of the Public Health Law." 10 NYCRR, § 80.107 (1973).

13. NY Pub Health Law § 12-b(2) (McKinney 1971).

by the computer. Twenty months after the effective date of the Act, the computerized data had only been used in two investigations involving alleged overuse by specific patients.

A few days before the Act became effective, this litigation was commenced by a group of patients regularly receiving prescriptions for Schedule II drugs, by doctors who prescribe such drugs, and by two associations of physicians.[14] After various preliminary proceedings,[15] a three-judge District Court conducted a one-day trial. Appellees offered evidence tending to prove that persons in need of treatment with Schedule II drugs will from time to time decline such treatment because of their fear that the misuse of the computerized data will cause them to be stigmatized as "drug addicts."[16]

[429 US 596]

The District Court held that "the doctor-patient relationship is one of the zones of privacy accorded constitutional protection" and that the patient-identification provisions of the Act invaded this zone with "a needlessly broad sweep," and enjoined enforcement of the provisions of the Act which deal with the reporting of patients' names and addresses.[17]

I

[1b] The District Court found that the State had been unable to demonstrate the necessity for the patient-identification requirement on the basis of its experience during the first 20 months of administration of the new statute. There was a time when that alone would have provided a basis for invalidating the statute. Lochner v New York, 198 US 45, 49 L Ed 937, 25 S Ct 539, involved legislation making it a crime for a baker to permit his employees to work more than 60 hours in a week. In an opinion no longer regarded as authoritative, the Court held the statute unconstitutional as "an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty . . . ." Id., at 56, 49 L Ed 937, 25 S Ct 539.

[429 US 597]

[4, 5a] The holding in Lochner has

14. The physicians' associations, Empire State Physicians Guild, Inc. and the American Federation of Physicians and Dentists, articulate no claims which are severable from the claims of the named physicians. We therefore find it unnecessary to consider whether the organizations themselves may have standing to maintain these suits.

15. In addition to the appeal from the original dismissal of the complaint, the parties took depositions which were made a part of the record and entered into a stipulation of facts.

16. Two parents testified that they were concerned that their children would be stigmatized by the State's central filing system. One child had been taken off his Schedule II medication because of this concern. Three adult patients testified that they feared disclosure of their names would result from central filing of patient identifications. One of them now obtains his drugs in another State. The other two continue to receive Schedule II prescriptions in New York, but continue to fear disclosure and stigmatization. Four physicians testified that the prescription system entrenches on patients' privacy, and that each had observed a reaction of shock, fear, and concern on the part of their patients whom they had informed of the plan. One doctor refuses to prescribe Schedule II drugs for his patients. On the other hand, over 100,000 patients per month have been receiving Schedule II drug prescriptions without their objections, if any, to central filing having come to the attention of the District Court. The record shows that the provisions of the Act were brought to the attention of the section on psychiatry of the New York State Medical Society (App 166a), but that body apparently declined to support this suit.

17. Pub Health Law §§ 3331(6), 3332(2)(a), 3333(4).

been implicitly rejected many times.[18] State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part.[19] For we have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern.[20]

[6a] The New York statute challenged in this case represents a considered attempt to deal with such a problem. It is manifestly the product of an orderly and rational legislative decision. It was recommended by a specially appointed commission which held extensive hearings on the proposed legislation, and drew on experience with similar programs in other States. There surely was nothing unreasonable in the assumption that the patient-identification requirement might

[429 US 598]

aid in the enforcement of laws designed to minimize the misuse of dangerous drugs. For the requirement could reasonably be expected to have a deterrent effect on potential violators[21] as well as to aid in the detection or investigation of specific instances of apparent abuse. At the very least, it would seem clear that the State's vital interest in controlling the distribution of dangerous drugs would support a decision to experiment with new techniques for control.[22] For if an experiment fails—if in this case experience teaches that the patient-identification requirement results in

18. Roe v Wade, 410 US 113, 117, 35 L Ed 2d 147, 93 S Ct 705; Griswold v Connecticut, 381 US 479, 481–482, 14 L Ed 2d 510, 85 S Ct 1678; Ferguson v Skrupa, 372 US 726, 729–730, 10 L Ed 2d 93, 83 S Ct 1028, 95 ALR2d 1347; FHA v The Darlington, Inc. 358 US 84, 91–92, 3 L Ed 2d 132, 79 S Ct 141.

19. **[5b]** "We are not concerned, however, with the wisdom, need, or appropriateness of the legislation." Olsen v Nebraska ex rel. Western Reference & Bond Assn. 313 US 236, 246, 85 L Ed 1305, 61 S Ct 862, 133 ALR 1500.

20. Mr. Justice Brandeis' classic statement of the proposition merits reiteration:

"To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold." New State Ice Co. v Liebmann, 285 US 262, 311, 76 L Ed 747, 52 S Ct 371 (dissenting opinion) (footnote omitted).

21. **[6b]** The absence of detected violations does not, of course, demonstrate that a statute has no significant deterrent effect.

"From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs . . ." Paris Adult Theatre I v Slaton, 413 US 49, 61, 37 L Ed 2d 446, 93 S Ct 2628 (citation omitted). "Nothing in the Constitution prohibits a State from reaching . . . a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data." Id., at 63, 37 L Ed 2d 446, 93 S Ct 2628.

22. "Such regulation, it can be assumed, could take a variety of valid forms." Robinson v California, 370 US 660, 664, 8 L Ed 2d 758, 82 S Ct 1417. Cf. Minnesota ex rel. Whipple v Martinson, 256 US 41, 45, 65 L Ed 819, 41 S Ct 425; Beauharnais v Illinois, 343 US 250, 261–262, 96 L Ed 919, 72 S Ct 725.

the foolish expenditure of funds to acquire a mountain of useless information—the legislative process remains available to terminate the unwise experiment. It follows that the legislature's enactment of the patient-identification requirement was a reasonable exercise of New York's broad police powers. The District Court's finding that the necessity for the requirement had not been proved is not, therefore, a sufficient reason for holding the statutory requirement unconstitutional.

II

[2b, 7a] Appellees contend that the statute invades a constitutionally protected "zone of privacy."[23] The cases sometimes

[429 US 599]

characterized as protecting "privacy" have in fact involved at least two different kinds of interests.[24] One is the individual interest in avoiding disclosure of personal matters,[25] and another is the interest in independence in making certain

[429 US 600]

kinds of important decisions.[26] Appellees argue that both of these interests are impaired by this

23. As the basis for the constitutional claim they rely on the shadows cast by a variety of provisions in the Bill of Rights. Language in prior opinions of the Court or its individual Justices provides support for the view that some personal rights "implicit in the concept of ordered liberty" (see Palko v Connecticut, 302 US 319, 325, 82 L Ed 288, 58 S Ct 149, quoted in Roe v Wade, 410 US, at 152, 35 L Ed 2d 147, 93 S Ct 705), are so "fundamental" that an undefined penumbra may provide them with an independent source of constitutional protection. In Roe v Wade, however, after carefully reviewing those cases, the Court expressed the opinion that the "right of privacy" is founded in the Fourteenth Amendment's concept of personal liberty, id., at 152–153, 35 L Ed 2d 147, 93 S Ct 705.

"This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, *as we feel it is,* or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Id., at 153, 35 L Ed 2d 147, 93 S Ct 705 (emphasis added). See also id., at 168–171, 35 L Ed 2d 147, 93 S Ct 705 (Stewart, J., concurring in judgment); Griswold v Connecticut, 381 US 479, 500, 14 L Ed 2d 510, 85 S Ct 1678 (Harlan, J., concurring).

24. Professor Kurland has written:

[7b] "The concept of a constitutional right of privacy still remains largely undefined. There are at least three facets that have been partially revealed, but their form and shape remain to be fully ascertained. The first is the right of the individual to be free in his private affairs from governmental surveillance and intrusion. The second is the right of an individual not to have his private affairs made public by the government. The third is the right of an individual to be free in action, thought, experience, and belief from governmental compulsion." The Private I, the University of Chicago Magazine 7, 8 (Autumn 1976). The first of the facets which he describes is directly protected by the Fourth Amendment; the second and third correspond to the two kinds of interests referred to in the text.

25. In his dissent in Olmstead v United States, 277 US 438, 478, 72 L Ed 944, 48 S Ct 564, 66 ALR 376, Mr. Justice Brandeis characterized "the right to be let alone" as "the right most valued by civilized men"; in Griswold v Connecticut, 381 US 479, 483, 14 L Ed 2d 510, 85 S Ct 1678, the Court said: "[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion." See also Stanley v Georgia, 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243; California Bankers Assn. v Shultz, 416 US 21, 79, 39 L Ed 2d 812, 94 S Ct 1494 (Douglas, J., dissenting); id., at 78, 39 L Ed 2d 812, 94 S Ct 1494) (Powell, J., concurring).

26. Roe v Wade, 410 US 113, 35 L Ed 2d 147, 93 S Ct 705; Doe v Bolton, 410 US 179, 35 L Ed 2d 201, 93 S Ct 739; Loving v Virginia, 388 US 1, 18 L Ed 2d 1010, 87 S Ct 1817; Griswold v Connecticut, 381 US 479, 14 L Ed 2d 510, 85 S Ct 1678; Pierce v Society of Sisters, 268 US 510, 69 L Ed 1070, 45 S Ct 571, 39 ALR 468; Meyer v Nebraska, 262 US 390, 67 L Ed 1042, 43 S Ct 625, 29 ALR 1446; Allgeyer v Louisiana, 165 US 578, 41 L Ed 832, 17 S Ct 427. In Paul v Davis, 424 US 693, 713, 47 L Ed 2d 405, 96 S Ct 1155, the Court characterized these decisions as dealing with

statute. The mere existence in readily available form of the information about patients' use of Schedule II drugs creates a genuine concern that the information will become publicly known and that it will adversely affect their reputations. This concern makes some patients reluctant to use, and some doctors reluctant to prescribe, such drugs even when their use is medically indicated. It follows, they argue, that the making of decisions about matters vital to the care of their health is inevitably affected by the statute. Thus, the statute threatens to impair both their interest in the nondisclosure of private information and also their interest in making important decisions independently.

We are persuaded, however, that the New York program does not, on its face, pose a sufficiently grievous threat to either interest to establish a constitutional violation.

Public disclosure of patient information can come about in three ways. Health Department employees may violate the statute by failing, either deliberately or negligently, to maintain proper security. A patient or a doctor may be accused of a violation and the stored data may be offered in evidence in a judicial proceeding. Or, thirdly, a doctor, a pharmacist, or the patient may voluntarily reveal information on a prescription form.

[8a] The third possibility existed under the prior law and is entirely unrelated to the existence of the computerized

[429 US 601]

data bank. Neither of the other two possibilities provides a proper ground for attacking the statute as invalid on its face. There is no support in the record, or in the experience of the two States that New York has emulated, for an assumption that the security provisions of the statute will be administered improperly.[27] And the remote possibility that judicial supervision of the

"matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas, it has been held that there are limitations on the States' power to substantively regulate conduct."

27. The Temporary State Commission's independent investigation of the California and Illinois central filing systems failed to reveal a single case of invasion of a patient's privacy. TSC Memorandum of Chester R. Hardt, Chairman, Re: Triplicate Prescriptions, New York State Controlled Substances Act, effective Apr. 1, 1973 (reproduced at App 88a).

Just last Term in Buckley v Valeo, 424 US 1, 46 L Ed 2d 659, 96 S Ct 612, we rejected a contention that the reporting requirements of the Federal Election Campaign Act of 1971 violated the First Amendment rights of those who contribute to minority parties:

"But no appellant in this case has tendered record evidence . . . . Instead, appellants primarily rely on 'the clearly articulated fears of individuals, well experienced in the political process.' . . . At best they offer the testimony of several minor-party officials that one or two persons refused to make contributions because of the possibility of disclosure. On this record, the substantial public interest in disclosure identified by the legislative history of this Act outweighs the harm generally alleged." 424 US, at 71–72, 46 L Ed 2d 659, 96 S Ct 612 (footnote omitted).

Here, too, appellees urge on us "clearly articulated fears" about the pernicious effects of disclosure. But this requires us to assume even more than that we refused to do in Buckley. There the disclosures were to be made in accordance with the statutory scheme. Appellees' disclosures could only be made if the statutory scheme were *violated* as described, supra, at 594–595, 51 L Ed 2d 70.

The fears of parents on behalf of their preadolescent children who are receiving amphetamines in the treatment of hyperkinesia are doubly premature. Not only must the Act's nondisclosure provisions be violated in order to stigmatize the children as they enter adult life, but the provisions requiring destruction of all prescription records after five years would have to be ignored, see n 11, supra, and accompanying text.

evidentiary use of particular items of stored information will provide inadequate protection

[429 US 602]

against unwarranted disclosures is surely not a sufficient reason for invalidating the entire patient-identification program.[28]

Even without public disclosure, it is, of course, true that private information must be disclosed to the authorized employees of the New York Department of Health. Such disclosures, however, are not significantly different from those that were required under the prior law. Nor are they meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care. Unquestionably, some individuals' concern for their own privacy may lead them to avoid or to postpone needed medical attention. Nevertheless, disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient.[29] Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.

Appellees also argue, however, that even if unwarranted disclosures do not actually occur, the knowledge that the information is readily available in a computerized file creates a genuine concern that causes some persons to decline needed

[429 US 603]

medication. The record supports the conclusion that some use of Schedule II drugs has been discouraged by that concern; it also is clear, however, that about 100,000 prescriptions for such drugs were being filled each month prior to the entry of the District Court's injunction. Clearly, therefore, the statute did not deprive the public of access to the drugs.

[9a] Nor can it be said that any individual has been deprived of the right to decide independently, with the advice of his physician, to acquire and to use needed medication. Although the State no doubt could prohibit entirely the use of particular Schedule II drugs,[30] it has not done so. This case is therefore unlike those in which the Court held that a total prohibition of certain conduct was an impermissible deprivation of

28. **[8b]** The physician-patient evidentiary privilege is unknown to the common law. In States where it exists by legislative enactment, it is subject to many exceptions and to waiver for many reasons. C. McCormick, Evidence §§ 98, 101–104 (2d ed 1972); 8 J. Wigmore, Evidence §§ 2380, nn 3, 5, 6, 2388–2391 (McNaughton rev ed 1961).

29. Familiar examples are statutory reporting requirements relating to venereal disease, child abuse, injuries caused by deadly weapons, and certifications of fetal death. Last Term we upheld the recordkeeping requirements of the Missouri abortion laws against a challenge based on the protected interest in making the abortion decision free of governmental intrusion, Planned Parenthood of Central Missouri v Danforth, 428 US 52, 79–81, 49 L Ed 2d 788, 96 S Ct 2831.

30. **[9b]** It is, of course, well settled that the State has broad police powers in regulating the administration of drugs by the health professions. Robinson v California, 370 US, at 664–665, 8 L Ed 2d 758, 82 S Ct 1417; Minnesota ex rel. Whipple v Martinson, 256 US, at 45, 65 L Ed 819, 41 S Ct 425; Barsky v Board of Regents, 347 US 442, 449, 98 L Ed 829, 74 S Ct 650.

liberty. Nor does the State require access to these drugs to be conditioned on the consent of any state official or other third party.[31] Within dosage limits which appellees do not challenge, the decision to prescribe, or to use, is left entirely to the physician and the patient.

We hold that neither the immediate nor the threatened impact of the patient-identification requirements in the New York State Controlled Substances Act of 1972 on either the reputation or the independence of patients for whom Schedule II drugs are medically indicated is sufficient to constitute an

[429 US 604]

invasion of any right or liberty protected by the Fourteenth Amendment.[32]

III

[3b] The appellee doctors argue separately that the statute impairs their right to practice medicine free of unwarranted state interference. If the doctors' claim has any reference to the impact of the 1972 statute on their own procedures, it is clearly frivolous. For even the prior statute required the doctor to prepare a written prescription identifying the name and address of the patient and the dosage of the prescribed drug. To the extent that their claim has reference to the possibility that the patients' concern about disclosure may induce them to refuse needed medication, the doctors' claim is derivative from, and therefore no stronger than, the patients'.[33] Our rejection of

31. In Doe v Bolton, 410 US 179, 35 L Ed 2d 201, 93 S Ct 739, for instance, the constitutionally defective statute required the written concurrence of two state-licensed physicians, *other than* the patient's personal physician, before an abortion could be performed, and the advance approval of a committee of not less than three members of the hospital staff where the procedure was to be performed, regardless of whether the committee members had a physician-patient relationship with the woman concerned.

32. The Roe appellees also claim that a constitutional privacy right emanates from the Fourth Amendment, citing language in Terry v Ohio, 392 US 1, 9, 20 L Ed 2d 889, 88 S Ct 1868, 44 Ohio Ops 2d 383, at a point where it quotes from Katz v United States, 389 US 347, 19 L Ed 2d 576, 88 S Ct 507. But those cases involve affirmative, unannounced, narrowly focused intrusions into individual privacy during the course of criminal investigations. We have never carried the Fourth Amendment's interest in privacy as far as the Roe appellees would have us. We decline to do so now.

Likewise the Patient appellees derive a right to individual anonymity from our freedom of association cases such as Bates v Little Rock, 361 US 516, 522–523, 4 L Ed 2d 480, 80 S Ct 412, and NAACP v Alabama, 357 US 449, 462, 2 L Ed 2d 1488, 78 S Ct 1163. But those cases protect "freedom of association for the purpose of advancing ideas and airing grievances," Bates v Little Rock, supra, at 523, 4 L Ed 2d 480, 80 S Ct 412, not anonymity in the course of medical treatment. Also, in those cases there was an uncontroverted showing of past harm through disclosure, NAACP v Alabama, supra, at 462, 2 L Ed 2d 1488, 78 S Ct 1163, an element which is absent here.

Cf. Schulman v New York City Health & Hospitals Corp. 38 NY2d 234, 342 NE2d 501 (1975).

33. The doctors rely on two references to a physician's right to administer medical care in the opinion in Doe v Bolton, 410 US, at 197–198, and 199, 35 L Ed 2d 201, 93 S Ct 739. Nothing in that case suggests that a doctor's right to administer medical care has any greater strength than his patient's right to receive such care. The constitutional right vindicated in Doe was the right of a pregnant woman to decide whether or not to bear a child without unwarranted state interference. The statutory restrictions on the abortion procedures were invalid because they encumbered the woman's exercise of that constitutionally protected right by placing obstacles in the path of the doctor upon whom she was entitled to rely for advice in connection with her decision. If those obstacles had not impacted upon the woman's freedom to make a constitutionally protected decision, if they had merely made the physician's work more laborious or less independent without any impact

their claim therefore disposes of the doctors' as well.

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IV

A final word about issues we have not decided. We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files.[34] The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces and the enforcement of the criminal laws, all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy. We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure

[429 US 606]

of accumulated private data—whether intentional or unintentional—or by a system that did not contain comparable security provisions. We simply hold that this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment.

Reversed.

SEPARATE OPINIONS

Mr. Justice **Brennan,** concurring.

I write only to express my understanding of the opinion of the Court, which I join.

The New York statute under attack requires doctors to disclose to the State information about prescriptions for certain drugs with a high potential for abuse, and provides for the storage of that information in a central computer file. The Court recognizes that an individual's "interest in avoiding disclosure of personal matters" is an aspect of the right of privacy, ante, at 598–600, 51 L Ed 2d 73, and nn 24–25, but holds that in this case, any such interest has not been seriously enough invaded by the State to require a showing that its program was indispensable to the State's effort to control drug abuse.

The information disclosed by the physician under this program is made available only to a small number of public health officials with a legitimate interest in the information. As the record makes clear, New York has long required doctors to make this information available to its officials on request, and that

on the patient, they would not have violated the Constitution.

34. Boyer, Computerized Medical Records and the Right to Privacy: The Emerging Federal Response, 25 Buffalo L Rev 37 (1975); Miller, Computers, Data Banks and Individual Privacy: An Overview, 4 Colum Human Rights L Rev 1 (1972); A. Miller, The Assault on Privacy (1971). See also Utz v Cullinane, 172 US App DC 67, 78–82, 520 F2d 467, 478–482 (1975).

practice is not challenged here. Such limited reporting requirements in the medical field are familiar, ante, at 602 n 29, 51 L Ed 2d 75, and are not generally regarded as an invasion of privacy. Broad dissemination by state officials of such information, however, would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests. See, e.g., Roe v Wade, 410 US 113, 155–156, 35 L Ed 2d 147, 93 S Ct 705 (1973).

What is more troubling about this scheme, however, is the central computer storage of the data thus collected. Obviously, as the State argues, collection and storage of data

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by the State that is in itself legitimate is not rendered unconstitutional simply because new technology makes the State's operations more efficient. However, as the example of the Fourth Amendment shows, the Constitution puts limits not only on the type of information the State may gather, but also on the means it may use to gather it. The central storage and easy accessibility of computerized data vastly increases the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology.

In this case, as the Court's opinion makes clear, the State's carefully designed program includes numerous safeguards intended to forestall the danger of indiscriminate disclosure. Given this serious and, so far as the record shows, successful effort to prevent abuse and limit access to the personal information at issue, I cannot say that the statute's provisions for computer storage, on their face, amount to a deprivation of constitutionally protected privacy interests, any more than the more traditional reporting provisions.

In the absence of such a deprivation, the State was not required to prove that the challenged statute is absolutely necessary to its attempt to control drug abuse. Of course, a statute that did effect such a deprivation would only be consistent with the Constitution if it were necessary to promote a compelling state interest. Roe v Wade, supra; Eisenstadt v Baird, 405 US 438, 464, 31 L Ed 2d 349, 92 S Ct 1029 (1972) (White, J., concurring in result).

Mr. Justice **Stewart**, concurring.

In Katz v United States, 389 US 347, 19 L Ed 2d 576, 88 S Ct 507, the Court made clear that although the Constitution affords protection against certain kinds of government intrusions into personal and private matters,* there is no "general constitutional 'right to

[429 US 608]

privacy.' . . . [T]he

* See 389 US, at 350 n 5, 19 L Ed 2d 576, 88 S Ct 507;

"The First Amendment, for example, imposes limitations upon governmental abridgment of 'freedom to associate and privacy in one's association.' NAACP v Alabama, 357 US 449, 462, [2 L Ed 2d 1488, 78 S Ct 1163]. The Third Amendment's prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion. To some extent, the Fifth Amendment too 'reflects the Constitution's concern for . . . ". . . the right of each individual 'to a private enclave where he may lead a private life.' "' Tehan v Shott, 382 US 406, 416, 15 L Ed 2d 453, 86 S Ct 459, 35 Ohio Ops 2d 391. Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution."

As the Court notes, ante, at 599–600, 51 L Ed 2d 73, and n 26, there is also a line of authority, often characterized as involving

protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States." Id., at 350–351, 19 L Ed 2d 576, 88 S Ct 507 (footnote omitted).

Mr. Justice Brennan's concurring opinion states that "[b]road dissemination by state officials of [the information collected by New York State] . . . would clearly implicate constitutionally protected privacy rights . . . ." Ante, at 606, 51 L Ed 2d 78. The only possible support in his opinion for this statement is its earlier reference to two footnotes in the Court's opinion, ibid., citing ante, at 598–600, 51 L Ed 2d 73, and nn 24–25 (majority opinion). The footnotes, however, cite to only two Court opinions, and those two cases do not support the proposition advanced by Mr. Justice Brennan.

The first case referred to, Griswold v Connecticut, 381 US 479, 14 L Ed 2d 510, 85 S Ct 1678, held that a State cannot constitutionally prohibit a married couple from using contraceptives in the privacy of their home. Although the broad language of the opinion includes a discussion of privacy, see id., at 484–485, 14 L Ed 2d 510, 85 S Ct 1678, the constitutional protection there discovered also related to (1) marriage, see id., at 485–486, 14 L Ed 2d 510, 85 S Ct 1678; id., at 495, 14 L Ed 2d 510, 85 S Ct 1678 (Goldberg, J., concurring); id., at

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500, 14 L Ed 2d 510, 85 S Ct 1678 (Harlan, J., concurring in judgment), citing Poe v Ullman, 367 US 497, 522, 6 L Ed 2d 989, 81 S Ct 1752 (Harlan, J., dissenting); 381 US, at 502–503, 14 L Ed 2d 510, 85 S Ct 1678 (White, J., concurring in judgment); (2) privacy *in the home,* see id., at 484–485, 14 L Ed 2d 510, 85 S Ct 1678 (majority opinion); id., at 495, 14 L Ed 2d 510, 85 S Ct 1678 (Goldberg, J., concurring); id., at 500, 14 L Ed 2d 510, 85 S Ct 1678 (Harlan, J., concurring in judgment), citing Poe v Ullman, supra, at 522, 6 L Ed 2d 989, 81 S Ct 1752 (Harlan, J., dissenting); and (3) the right to use contraceptives, see 381 US, at 503, 14 L Ed 2d 510, 85 S Ct 1678 (White, J., concurring in judgment); see also Roe v Wade, 410 US 113, 169–170, 35 L Ed 2d 147, 93 S Ct 705 (Stewart, J., concurring). Whatever the ratio decidendi of Griswold, it does not recognize a general interest in freedom from disclosure of private information.

The other case referred to, Stanley v Georgia, 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243, held that an individual cannot constitutionally be prosecuted for possession of obscene materials in his home. Although Stanley makes some reference to privacy rights, id., at 564, 22 L Ed 2d 542, 89 S Ct 1243, the holding there was simply that the *First* Amendment—as made applicable to the States by the Fourteenth—protects a person's right to read what he chooses in circumstances where that choice poses no threat to the sensibilities or welfare of others, id., at 565–568, 22 L Ed 2d 542, 89 S Ct 1243.

Upon the understanding that nothing the Court says today is contrary to the above views, I join its opinion and judgment.

"privacy," affording constitutional protection to the autonomy of an individual or a family unit in making decisions generally relating to marriage, procreation, and raising children.

mined "wholly irrespective" of the owner's "permanent domicil in a foreign country." And the court put out of view the situs of the yacht. That the court had no doubt of the power to tax was illustrated by reference to the income tax laws of prior years and their express extension to those domiciled abroad. The illustration has pertinence to the case at bar, for the case at bar is concerned with an income tax, and the power to impose it.

We may make further exposition of the national power, as the case depends upon it. It was illustrated at once in United States v. Bennett by a contrast with the power of a state. It was pointed out that there were limitations upon the latter that were not on the national power. The taxing power of a state, it was decided, encountered at its borders the taxing power of other states and was limited by them. There was no such limitation, it was pointed [56] out, upon the national power, and that the limitation upon the states affords, it was said, no ground for constructing a barrier around the United States, "shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty."

The contention was rejected that a citizen's property without the limits of the United States derives no benefit from the United States. The contention, it was said, came from the confusion of thought in "mistaking the scope and extent of the sovereign power of the United States as a nation, and its relations to its citizens and their relation to it." And that power, in its scope and extent, it was decided, is based on the presumption that government, by its very nature, benefits the citizen and his property wherever found, and that opposition to it holds on to citizenship while it "belittles and destroys its advantages and blessings by denying the possession by government of an essential power required to make citizenship completely beneficial." In other words, the principle was declared that the government, by its very nature, benefits the citizen and his property, wherever found, and therefore has the power to make the benefit complete. Or, to express it another way, the basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States, nor was not and cannot be made dependent upon the domicil of the citizen, that being in or out of the United States, but upon his relation as citizen to the United States, and the relation of the latter to him as citizen. The consequence of the relations is that the native citizen who is taxed may have domicil, and the property from which his income is derived may have situs, in a foreign country, and the tax be legal,—the government having power to impose the tax.

Judgment affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

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[57]CHARLIE HESTER, Plff. in Err.,
v.
UNITED STATES OF AMERICA.

(See S. C. Reporter's ed. 57-59.)

Evidence — liquor taken without warrant — unlawful search.

1. The 4th and 5th Amendments to the Federal Constitution do not exclude evidence as to the contents of receptacles which officers saw in possession of one accused of concealing distilled spirits, and of his companion, in an open field, and which such persons dropped and broke when pursued by the officers.

[For other cases, see Search and Seizure, 1-11, in Digest Sup. Ct. 1922 Supp.]

Search — protection to person in open field.

2. The protection extended by the 4th Amendment to the Federal Constitution of

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Note.—On admissibility against defendant of document or articles taken from him—see notes to State v. Edwards, 59 L.R.A. 465; State v. Fuller, 8 L.R.A.(N.S.) 762; People v. Campbell, 34 L.R.A.(N.S.) 58; Weeks v. United States, L.R.A.1915B, 834; and Blacksburg v. Beam, L.R.A.1916E, 715.

On unreasonable search and seizure—see note to Levy v. Superior Ct. 29 L.R.A. 818.

As to constitutional guaranties against unreasonable searches and seizures as applied to search for, or seizure of, intoxicating liquor—see notes to People v. Marxhausen, 3 A.L.R. 1514; Youman v. Com. 13 A.L.R. 1316; and Voorhies v. Faust, 27 A.L.R. 709.

On sufficiency of statutory immunity to satisfy constitutional guaranties against self-incrimination—see notes to Interstate Commerce Commission v. Baird, 48 L. ed. U. S. 860, and Arndstein v. McCarthy, 65 L. ed. U. S. 138.

security in person, houses, papers, and effects, does not extend to open fields.
[For other cases, see Search and Seizure, 1–11, in Digest Sup. Ct. 1923 Supp.]

[No. 243.]

Submitted April 24, 1924. Decided May 5, 1924.

ON WRIT of Error to the District Court of the United States for the Western District of South Carolina to review a judgment convicting defendant of concealing distilled spirits. Affirmed.

The facts are stated in the opinion.

Mr. **Richard A. Ford** submitted the cause for plaintiff in error. Mr. H. P. Burbage was on the brief:

Defendant, by the conduct of Gosnell and King in acquiring information in the way they did, was compelled to give testimony against himself.

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, L.R.A.1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177; Silverthorne Lumber Co. v. United States, 251 U. S. 385, 64 L. ed. 319, 24 A.L.R. 1426, 40 Sup. Ct. Rep. 182; Gouled v. United States, 255 U. S. 298, 65 L. ed. 647, 41 Sup. Ct. Rep. 261; Amos v. United States, 255 U. S. 313, 65 L. ed. 654, 41 Sup. Ct. Rep. 266; Andrews v. United States, 261 U. S. 628, 67 L. ed. 834, 43 Sup. Ct. Rep. 360.

Solicitor General **Beck** and Assistant Attorney General **Mabel Walker Willebrandt** submitted the cause for defendant in error:

There was no search or seizure of the defendant's person, house, papers, or effects.

Hale v. Henkel, 201 U. S. 43, 76, 50 L. ed. 652, 666, 26 Sup. Ct. Rep. 370; Adams v. New York, 192 U. S. 585, 596, 598, 48 L. ed. 575, 579, 580, 24 Sup. Ct. Rep. 372; 5 Wigmore, Ev. 2d ed. §§ 2183, 2264.

Even if there was a search and seizure without warrant, it was not unreasonable.

Gouled v. United States, 255 U. S. 298, 301, 65 L. ed. 647, 41 Sup. Ct. Rep. 261; Green v. United States, 289 Fed. 238; Agnello v. United States, — A.L.R. —, 290 Fed. 676, 262 U. S. 738, 67 L. ed. 1208, 43 Sup. Ct. Rep. 523; Lambert v. United States, 282 Fed. 413; United States v. Bateman, 278 Fed. 231; Boyd v. United States, 116 U. S. 616, 623, 624, 29 L. ed. 746, 748, 749, 6 Sup. Ct. Rep. 524; Haywood v. United States, 268 Fed. 803; Sioux Falls v. Walser, 45 S. D. 417, 187 N. W. 823; United States v. Welsh, 247 Fed. 249; United States v. McBride, 287 Fed. 218; Herine v. United States, 276 Fed. 806; Vachina v. United States, 283 Fed. 35; Kathriner v. United States, 276 Fed. 808; United States v. Hilsinger, 284 Fed. 585; McBride v. United States, 284 Fed. 416; Ex parte Morrill, 35 Fed. 267; O'Connor v. United States, 281 Fed. 396; United States v. Fenton, 268 Fed. 221; Welsh v. United States, 267 Fed. 819; United States v. Snyder, 278 Fed. 650.

Defendant was not compelled to be a witness against himself.

Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, L.R.A.1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177; notes in 3 A.L.R. 1514, 1522; 20 A.L.R. 652, 654; 24 A.L.R. 1408, 1426; 59 L.R.A. 465, 474; L.R.A. 1915B, 834, 840; and L.R.A.1916E, 715–717.

Mr. Justice Holmes delivered the opinion of the court:

The plaintiff in error, Hester, was convicted of concealing distilled spirits, etc., under Rev. Stat. § 3296, Comp. Stat. § 6038, 4 Fed. Stat. Anno. 2d ed. p. 56. The case is brought here directly from the district court on the single ground that, by refusing to exclude the testimony of two witnesses and to direct a verdict for the defendant, the plaintiff in error, the court violated his [58] rights under the 4th and 5th Amendments of the Constitution of the United States.

The witnesses whose testimony is objected to were revenue officers. In consequence of information they went toward the house of Hester's father, where the plaintiff in error lived, and, as they approached, saw one Henderson drive near to the house. They concealed themselves from 50 to 100 yards away and saw Hester come out and hand Henderson a quart bottle. An alarm was given. Hester went to a car standing near, took a gallon jug from it, and he and Henderson ran. One of the officers pursued, and fired a pistol. Hester dropped his jug, which broke but kept about a quart of its contents. Henderson threw away his bottle also. The jug and bottle both contained what the officers, being experts, recognized as moonshine whisky,—that is, whisky illicitly distilled; said to be easily recognizable. The other officer entered the house, but being told there was no whisky there, left it, but found outside a jar that had been thrown out and broken, and that also contained whisky. While the officers were there other cars stopped at the house, but

were spoken to by Hester's father, and drove off. The officers had no warrant for search or arrest, and it is contended that this made their evidence inadmissible; it being assumed, on the strength of the pursuing officer's saying that he supposed they were on Hester's land, that such was the fact. It is obvious that, even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure. The defendant's own acts, and those of his associates, disclosed the jug, the jar, and the bottle; and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned. This evidence was not obtained by the entry into the house, and it is immaterial to discuss that. The suggestion that the defendant was compelled to give evidence against himself [59] does not require an answer. The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, the special protection accorded by the 4th Amendment to the people in their "persons, houses, papers, and effects" is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Com. 223, 225, 226.

Judgment affirmed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plff. in Err.,
v.
CENTRAL IRON & COAL COMPANY.

(See S. C. Reporter's ed. 59–70.)

Carriers — contract to reduce freight charges — legality.

1. A carrier cannot reduce the amount legally payable for transportation of freight in an interstate shipment, or release the liability of the shipper, who has assumed an obligation to pay the charges.

[For other cases, see Carriers, 205–296, in Digest Sup. Ct. 1908; 109–200, in 1918 Supp.; 67–110, in 1923 Supp.]

Estoppel — of carrier to enforce charge for freight transportation.

2. No act or omission of a carrier, except in permitting the running of the Statute of Limitations, can estop or preclude it from enforcing payment of the full amount due for transportation of freight by a person liable therefor.

[For other cases, see Estoppel, 109–248, in Digest Sup. Ct. 1908; 6–17, in 1918 Supp.; 3–9, in 1923 Supp.]

Carriers — duty of shipper to pay freight charges.

3. Delivery of goods to a carrier for transportation does not, under the Interstate Commerce Act, impose upon the shipper an absolute obligation to pay the freight charges.

Carriers — when shipper not primarily liable for freight.

4. One delivering freight to a carrier for transportation may be found not to be primarily liable for freight charges where the bill of lading indicates that he was neither the owner nor the person on whose behalf the shipment was being made, but that the goods were either owned by, or the shipment was made on behalf of, a third person.

Carriers — effect of acceptance by consignee.

5. Acceptance by the consignee of freight delivered to a carrier for transportation satisfies the obligation of the shipper that he will accept, and relieves him of his secondary obligation for the freight charge.

[No. 198.]

Argued February 19, 1924. Decided May 5, 1924.

ON WRIT of Error to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment affirming a judgment of the District Court for the Western Division of the Northern District of Alabama in defendant's favor in an action brought to recover freight charges alleged to be due and unpaid. Affirmed.

See same case below, 284 Fed. 250.

The facts are stated in the opinion.

Mr. **Homer W. Davis** argued the cause, and, with Messrs. Gardiner Lathrop and Edward S. Jouett, filed a brief for plaintiff in error:

Prior to the passage of the Interstate Commerce Act, it was uniformly held that the shipment of goods under a bill of lading containing no express provision requiring payment of freight by the consignor impliedly bound him so to do, irrespective of whether or not he was the owner of the goods shipped.

Wooster v. Tarr, 8 Allen, 270, 85 Am. Dec. 707; Blanchard v. Page, 8 Gray,

Note.—On right of carrier to recover the difference between rate charged shipper and proper rate—see note to Central R. Co. v. Mauser, 49 L.R.A. (N.S.) 92.

On liability of consignor for freight—see note to Coal & Coke R. Co. v. Buckhannon River Coal & Coke Co. L.R.A.1917A, 665.

[440 US 173]

ILLINOIS STATE BOARD OF ELECTIONS, Appellant,

v

SOCIALIST WORKERS PARTY et al.

440 US 173, 59 L Ed 2d 230, 99 S Ct 983

[No. 77-1248]

Argued November 6, 1978. Decided February 22, 1979.

Decision: Signature requirement of Illinois Elections Code for new political party and independent candidate gaining access to ballot, held violative of equal protection as applied to Chicago mayoral election.

SUMMARY

Because of the distinction drawn by the Illinois Election Code as to the requirement for a new political party or independent candidate appearing on the ballot in statewide elections and the requirement for a new political party or independent candidate appearing on the ballot in elections for offices of political subdivisions of the state—the Code requiring, as to a statewide election, that the signatures of 25,000 qualified voters be obtained, and, as to an election for a local office, that the signatures of five percent of the number of persons who voted at the previous election for the local office be obtained—an independent candidate or new political party seeking access to the ballot for a special mayoral election in Chicago had to obtain more than 25,000 signatures to appear on the ballot. An independent candidate and certain new political parties who desired to appear on the ballot for the Chicago mayoral election challenged, in the United States District Court for the Northern District of Illinois, the constitutionality of the discrepancy between the requirement for state and city elections, asserting, among other things, that the discrepancy violated the equal protection clause of the Fourteenth Amendment. Finding as to the equal protection challenge that there was no rational reason why a petition with identical signatures could satisfy legitimate state interests for restricting ballot access in state elections and yet fail to do the same in an election in a lesser political unit, the District Court permanently enjoined enforcement of the five percent requirement insofar as it mandated more than the 25,000 signatures for the

SUBJECT OF ANNOTATION

Beginning on page 852, infra

Fourteenth Amendment equal protection clause as affecting nomination or election to state office

Briefs of Counsel, p 849, infra.

mayoral election (433 F Supp 11), and the United States Court of Appeals for the Seventh Circuit affirmed (566 F2d 586).

On appeal, the United States Supreme Court affirmed. In an opinion by MARSHALL, J., joined by BRENNAN, STEWART, WHITE, BLACKMUN, and POWELL, JJ., it was held that the Code, insofar as it required independent candidates and new political parties to obtain more than 25,000 signatures for elections in Chicago, violated the Fourteenth Amendment's equal protection clause, since the signature requirement for independent candidates and new political parties seeking office in Chicago was not the least restrictive means of protecting the state's objectives in regulating the number of candidates on the ballot, and since Illinois had advanced no reason why a more stringent requirement had to be applied in Chicago, much less the compelling reason which the state had to establish because of the involvement of the fundamental individual right of individuals to associate for the advancement of political beliefs and the fundamental right of qualified voters to cast their votes effectively.

BLACKMUN, J., concurring, expressed the view that the use, as tests, of phrases such as "compelling state interest" and "least drastic [or restrictive] means" was not helpful for constitutional analysis, being too convenient and result-oriented.

BURGER, Ch. J., concurred in the judgment.

REHNQUIST, J., concurred in the judgment on the ground that the Illinois law at issue was merely a truncated version of an original enactment which the Supreme Court had earlier held violative of equal protection, and that the law's disparate treatment bore no rational relationship to any state interest.

STEVENS, J., concurring in the judgment, expressed the view that the law at issue deprived new political parties and independent candidates of their liberty without the due process of lawmaking which is required by the Fourteenth Amendment.

HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

Constitutional Law § 334 — equal protection — state and local elections — signature requirements for ballot access

1a, 1b. A state law governing the number of signatures required in order for new political parties or independent candidates to obtain access to the ballot, which law, requiring the signatures of 25,000 qualified voters in order to obtain a place on the ballot in a statewide election and the signatures of five percent of the number of voters who voted in the previous election in order to obtain a place on the ballot for a local office, operates in such a way that new parties and independent candidates seeking access to the ballot for a mayoral election in a certain city must obtain more signatures than they would have to obtain in order to be on the ballot for a statewide election, violates the equal protection clause of the Fourteenth Amendment, where the signature requirement for independent candidates and new parties seeking office in the city is not the least restrictive means of protecting the state's objectives in regulating the number of candidates on the ballot, and there is no compelling reason why the requirement for elections in the city should be more stringent than the requirement for statewide elections.

[See annotation p 852, infra]

Courts § 767 — summary affirmance by Supreme Court — precedent in later case — distinction in cases

2. The summary affirmance without opinion by the United States Supreme Court of a Federal District Court's decision—in which decision the District Court rejected an equal protection challenge made by an independent candidate for the office of mayor in Chicago to an Illinois law requiring new political parties and independent candidates for local office to obtain signatures equal to five percent of the number of persons who voted at the previous election for such office in order to obtain a place on the ballot—does not dispose of a subsequent equal protection challenge made in another case to the five percent requirement by certain new political parties and an independent candidate seeking a

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25 Am Jur 2d, Elections §§ 168 et seq.
USCS, Constitution, 14th Amendment
US L Ed Digest, Constitutional Law § 334
L Ed Index to Annos, Equal Protection of the Laws
ALR Quick Index, Equal Protection of Law
Federal Quick Index, Equal Protection of the Laws

ANNOTATION REFERENCES

Fourteenth Amendment equal protection clause as affecting nomination or election to state office. 59 L Ed 2d 852.

Precedential weight of Supreme Court's memorandum decision summarily affirming lower federal court judgment on appeal or summarily dismissing appeal from state court. 45 L Ed 2d 791.

What circumstances render civil case, or issues arising therein, moot so as to preclude Supreme Court's consideration of their merits. 44 L Ed 2d 745.

Fourteenth Amendment as affecting nomination or election to state office. 11 L Ed 2d 1057, 23 L Ed 2d 782.

place on the ballot for a special mayoral election in Chicago, where the basis for the challenge in the summarily affirmed decision had been the discrepancy between the requirements for independent candidates and those for established party candidates while the subsequent equal protection challenge in the later case is based upon the discrimination between independent candidates and new parties seeking access in city elections on the one hand and independent candidates and new parties seeking access to the ballot in statewide elections on the other, and where although the equal protection issue asserted in the second challenge might have been alluded to and incorporated in a jurisdictional statement filed in the Supreme Court for the case which had been summarily affirmed, such issue had not been directly addressed in the jurisdictional statement so as to have been adequately presented to and necessarily decided by the Supreme Court.

Courts §§ 766, 775 — Supreme Court — summary affirmance without opinion — precedential value

3. Summary affirmances without opinion by the United States Supreme Court have considerably less precedential value than an opinion on the merits, and the Supreme Court will not hesitate to discard a rule which a line of summary affirmances may appear to have established.

Courts § 766 — Supreme Court — summary affirmance — effect of summary disposition

4. The precedential effect of summary affirmances without opinion by the United States Supreme Court can extend no further than the precise issues presented and necessarily decided by those actions, and since a summary disposition affirms only the judgment of the court below, no more may be read into the Supreme Court's action than was essential to sustain that judgment; questions which merely lurk in the record are not resolved, and no resolution of them may be inferred.

Constitutional Law § 334 — equal protection — considerations in analysis — signature requirements for city office candidates

5. In determining whether the equal protection clause of the Fourteenth Amendment is violated by a state's law governing the number of signatures which have to be obtained in order for new parties or independent candidates to obtain a place on the ballot because such law, as applied to elections for local office in a certain city, required new parties and independent candidates to obtain more signatures than required for statewide elections, an examination must be made of the character of the classification in question, the importance of the individual interests at stake, and the state interests asserted in support of the classification.

[See annotation p 852, infra]

Constitutional Law § 318 — equal protection — fundamental individual rights — compelling interest for classification

6. For purposes of equal protection under the Fourteenth Amendment, when such vital individual rights as the fundamental right of individuals to associate for the advancement of political beliefs, and the fundamental right of qualified voters to cast their votes effectively are at stake, a state must establish that its classification is necessary to serve a compelling interest.

[See annotation p 852, infra]

Elections § 1 — access to ballot — state restrictions

7. Even when pursuing a legitimate interest, a state may not choose means that unnecessarily restrict constitutionally protected liberty, and particularly where restrictions on access to the ballot are involved, states must adopt the least drastic means to achieve their ends.

Courts § 763 — mootness — settlement agreement for election — authority of city election board

8. A Federal Court of Appeals properly dismisses as moot a claim by a state elections board that a city elections board lacked authority to conclude, without the state board's consent, a settlement agreement whereby, as to one par-

ticular special mayoral election which had taken place at the time of the Court of Appeals' decision, the city board relaxed the requirement of state law that new political parties and independent candidates seeking a place on the ballot for a mayoral election obtain the signatures of five percent of the number of persons who voted at the previous mayoral election and also extended the filing deadline for new and independent political candidates, where the state elections board does not contend that the city board had ever attempted previously to conclude litigation without its approval but merely asserts that the claim is one capable of repetition, the city board's entry into a settlement agreement reflects neither a policy it had determined to continue, nor even a consistent pattern of behavior, and the city board's action patently is not a matter of statutory prescription.

SYLLABUS BY REPORTER OF DECISIONS

Under the Illinois Election Code, new political parties and independent candidates must obtain the signatures of 25,000 qualified voters in order to appear on the ballot in statewide elections. However, the minimum number of signatures required in elections for offices of political subdivisions of the State is 5% of the number of persons who voted at the previous election for such offices. Application of these provisions to a special mayoral election in Chicago produced the result that a new party or independent candidate needed substantially more signatures than would be needed for ballot access in a statewide election. In actions by appellees, an independent candidate, two new political parties, and certain voters, challenging this discrepancy on equal protection grounds, the District Court enjoined enforcement of the 5% provision insofar as it mandated more than 25,000 signatures, and the Court of Appeals affirmed. *Held:*

1. This Court's summary affirmance in Jackson v Ogilvie, 403 US 925, 29 L Ed 2d 705, 91 S Ct 2247, of the District Court's decision in 325 F Supp 864, upholding Illinois' 5% signature requirement is not dispositive of the equal protection question presented here. The precedential effect of a summary affirmance can extend no further than "the precise issues presented and necessarily decided by those actions," Mandel v Bradley, 432 US 173, 176, 53 L Ed 2d 199, 97 S Ct 2238. In contrast to this case, the challenge in Jackson involved only the discrepancy between the 5% requirement and the less stringent requirements for candidates of established political parties. The issue presented here was not referred to by the Jackson District Court, and was mentioned only in passing in the jurisdictional statement subsequently filed with this Court. Thus, the issue was not adequately presented to, or decided by this Court in its summary affirmance.

2. The Illinois Election Code, insofar as it requires independent candidates and new political parties to obtain more than 25,000 signatures in Chicago violates the Equal Protection Clause of the Fourteenth Amendment.

(a) When such fundamental rights as the freedom to associate as a political party and the right to cast votes effectively are at stake, a State must establish that its regulation of ballot access is necessary to serve a compelling interest.

(b) "[E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty," Kusper v Pontikes, 414 US 51, 58, 59, 38 L Ed 2d 260, 94 S Ct 303, and States must adopt the least drastic means to achieve their ends. This requirement is particularly important where restrictions on access to the ballot are involved. Since the State has determined that a smaller number of signatures in a larger political unit adequately serves its interest in regulating the number of candidates on the ballot, the signature requirements

for independent candidates and political parties seeking offices in Chicago are clearly not the least restrictive means of achieving the same objective. Appellant State Board of Elections has advanced no reason, much less a compelling one, why the State needs a more stringent requirement for elections in Chicago than for statewide elections.

(c) Prior invalidation of Illinois' rules regarding geographic distribution of signatures tied the requirements for both city and state candidates solely to a population standard. However, while this may explain the anomaly at issue here, it does not justify it. Historical accident, without more, cannot constitute a compelling state interest.

3. The Court of Appeals properly dismissed as moot appellant's claim that the Chicago Board of Election Commissioners lacked authority to conclude a settlement agreement with respect to the unresolved issue whether the 5% signature requirement coupled with the filing deadline impermissibly burdened First and Fourteenth Amendment rights. Appellant has presented no evidence creating a reasonable expectation that the Chicago Board will repeat its purportedly unauthorized actions in subsequent elections.

566 F2d 586, affirmed.

Marshall, J., delivered the opinion of the Court, in which Brennan, Stewart, White, Blackmun, and Powell, JJ., joined, and in Parts I, II, and IV of which Stevens, J., joined. Blackmun, J., filed a concurring opinion. Stevens, J., filed an opinion concurring in part and concurring in the judgment. Burger, C. J., concurred in the judgment. Rehnquist, J., filed an opinion concurring in the judgment.

APPEARANCES OF COUNSEL

Michael L. Levinson argued the cause for appellant.

Jeffrey D. Colman and **Ronald Reosti** argued the cause for appellees.

Briefs of Counsel, p 849, infra.

OPINION OF THE COURT

[440 US 175]

Mr. Justice **Marshall** delivered the opinion of the Court.

[1a] Under the Illinois Election Code, new political parties and independent candidates must obtain the signatures of 25,000 qualified voters in order to appear on the ballot in statewide elections.[1] However, a dif-

1. Under Ill Ann Stat, ch 46, § 10-2 (Supp 1978):

"A political party which, at the last general election for State and county officers, polled for its candidate for Governor more than 5% of the entire vote cast for Governor, is hereby declared to be an 'established political party' as to the State and as to any district or political subdivision thereof.

"A political party which, at the last election in any congressional district, legislative district, county, township, school district, park district, municipality or other district or political subdivision of the State, polled more than 5% of the entire vote cast within such congressional district, legislative district, county, township, school district, park district, municipality, or political subdivision of the State, where such district, political subdivision or municipality, as the case may be, has voted as a unit for the election of officers to serve the respective territorial area of such district, political subdivision or municipality, is hereby declared to be an 'established political party' within the meaning of this Article as to such district, political subdivision or municipality." A *new* political party is one that has not met these requirements.

Individuals desiring to form a new political party throughout the State must file with the State Board of Elections a petition that, inter alia, is "signed by not less than 25,000 qualified voters." In Communist Party of Illinois v State Board of Elections, 518 F2d 517 (CA7), cert denied, 423 US 986, 46 L Ed 2d 303, 96 S Ct 394 (1975), the Court of Appeals held unconstitutional the proviso in this section requiring "that no more than 13,000 signatures

ferent standard applies in elections
[440 US 176]
for offices of political subdivisions of the State. The minimum number of signatures required for those elections is 5% of the number of persons who voted at the previous election for offices of the particular subdivision.[2] In the city of Chicago, application of this standard has produced the incongruous
[440 US 177]
result that a new party or an independent candidate needs substantially more signatures to gain access to the ballot than a similarly situated party or candidate for statewide office.[3] The question before us is whether this discrepancy violates the Equal Protection Clause of the Fourteenth Amendment.

I

In January 1977, the Chicago City Council ordered a special mayoral election to be held on June 7, 1977, to fill the vacancy created by the death of Mayor Richard J. Daley. Pursuant to that order, the Chicago Board of Election Commissioners (Chicago Board) issued an election calendar that listed the filing dates and signature requirements applicable to independent candidates and new political parties. Independent candidates had to obtain 35,947 valid signatures by February 19, and new political parties were required to file petitions with 63,373 valid signatures by April 4.[4] Subsequently,

from the same county may be counted toward the required total of 25,000 signatures." Ill Ann Stat, ch 46, § 10-2 (Supp 1978).

A party that files a completed petition becomes entitled to place "upon the ballot at such next ensuing election such list of . . . candidates for offices to be voted for throughout the State . . . under the name of and as the candidates of such new political party." Ibid.

With respect to independent candidates, § 10-3 (Supp 1978) provides in pertinent part:

"Nomination of independent candidates (not candidates of any political party), for any office to be filled by the voters of the State at large may also be made by nomination papers signed in the aggregate for each candidate by not less than 25,000 qualified voters of the State; Provided, however, that no more than 13,000 signatures from the same county may be counted toward the required total of 25,000 signatures."

The record does not reveal whether the State enforces the proviso.

2. Section 10-2 provides:

"If such new political party shall be formed for any district or political subdivision less than the entire State, such petition shall be signed by qualified voters equaling in number not less than 5% of the number of voters who voted at the next preceding general election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area."

Under § 10-3,

"Nominations of independent candidates for public office within any district or political subdivision less than the State, may be made by nomination papers signed in the aggregate for each candidate by qualified voters of such district, or political division, equaling not less than 5%, nor more than 8% (or 50 more than the minimum, whichever is greater) of the number of persons, who voted at the next preceding general election in such district or political sub-division in which such district or political sub-division voted as a unit for the election of officers to serve its respective territorial area."

3. Candidates and new parties in Cook County, Ill., which is more populous than Chicago, would also have to obtain more than 25,000 signatures. In all political subdivisions of the State other than Chicago and Cook County, the 5% standard requires fewer than 25,000 signatures. Tr of Oral Arg 20.

4. This disparity in the signature requirements arose because the State and Chicago Boards used voting figures from the April 1, 1975, elections in computing the requirements for independents, but used figures from the November 2, 1976, general election in their calculations for new parties. The pertinent statutory language regarding signature requirements for independent candidates, however, is identical to that for new parties. Compare Ill Ann Stat, ch 46, § 10-3 (Supp 1978), with § 10-2.

the Chicago Board and the State Board of Elections (State Board) agreed for purposes of the special election to bring into conformity the requirements for independent candidates

[440 US 178]

and new parties. The filing deadline for independents was extended to April 4, and the signature requirement for new parties was reduced to 35,947.

Because they had received less than 5% of the votes cast in the last mayoral election, the Socialist Workers Party and United States Labor Party were new political parties as defined in the Illinois statute. See n 1, supra. Along with Gerald Rose, a candidate unaffiliated with any party, they were therefore subject to the signature requirements and filing deadlines specified in the election calendar. On January 24, 1977, the Socialist Workers Party and two voters who supported its candidate for mayor brought this action against the Chicago Board and the State Board to enjoin enforcement of the signature requirements and filing deadlines for new parties.[5] One week later, Gerald Rose, the United States Labor Party, and four voters sued the Chicago Board, challenging the restrictions on new parties and independent candidates. The State Board intervened as a defendant pursuant to 28 USC § 2403 [28 USCS § 2403], and the District Court consolidated the two cases for trial.

Plaintiff-appellees contended at trial that the discrepancy between the requirements for state and city elections violated the Equal Protection Clause. They argued further that the restrictions on independent candidates and new parties were unconstitutionally burdensome in the context of a special election because of the short time for collection of signatures between notice of the election and the filing deadline. The

[440 US 179]

Chicago Board's primary response was that the decision in Jackson v Ogilvie, 325 F Supp 864 (ND Ill), summarily affd, 403 US 925, 29 L Ed 2d 705, 91 S Ct 2247 (1971), upholding Illinois' 5% signature requirement, foreclosed the constitutional challenge in this case.[6]

In an opinion issued on March 14, 1977, the District Court determined that Jackson addressed neither the circumstances of a special election

Section 10-6 of the Election Code provides that nominating petitions for independents and new parties must be filed at least 64 days prior to the election, here, by April 4. The record does not reflect what caused the discrepancy in filing dates in this case.

5. The Chicago Board is responsible for accepting nominating petitions for candidates and preparing the ballots for special elections. Ill Ann Stat, ch 46, §§ 7-60, 7-62, 10-6 (Supp 1978). It also has "charge of and make[s] provisions for all elections, general, special, local, municipal, state and county, and all others of every description to be held in such city or any part thereof, at any time." § 6-26 (Supp 1978). The State Board exercises "general supervision over the administration of the registration and election laws throughout the State." § 1A-1; (Supp 1978); Ill, Const, Art 3, § 5.

6. Although the State Board was afforded notice and an opportunity to participate in the District Court proceedings, only the Chicago Board appeared for argument on plaintiff-appellees' motion for a permanent injunction. After the court entered the injunction, the State Board moved to vacate the decision, advancing many of the grounds previously asserted by the Chicago Board.

Only the State Board has appealed to this Court. The Chicago Board, defending its settlement argeement, see infra, at 180, 59 L Ed 2d, at 238, appears as an appellee. Subsequent references to the "appellees" in this opinion, however, will include only the plaintiff-appellees.

nor the disparity between state and city signature requirements at issue here. Socialist Workers Party v Chicago Bd. of Election Comm'rs, 433 F Supp 11, 16–17, 19. On the merits of appellees' equal protection challenge, the court found

> "[no] rational reason why a petition with identical signatures can satisfy the legitimate state interests for restricting ballot access in state elections, and yet fail to do the same in a lesser unit. Lendall v Jernigan, 424 F Supp 951 (ED Ark 1977). Any greater requirement than 25,000 signatures cannot be said to be the least drastic means of accomplishing the state's goals, and must be found to unduly impinge [on] the constitutional rights of independents, new political parties, and their adherents." Id., at 20 (footnote omitted).

Accordingly, the District Court permanently enjoined the enforcement of the 5% provision insofar as it mandated more than 25,000 signatures, the number required for statewide elections. The court also declined to dismiss appellees' claim

[440 US 180]

that the April 4 filing deadline coupled with the signature requirement impermissibly burdened First and Fourteenth Amendment rights, but it postponed a decision on this issue pending submission of additional evidence to justify the selection of that date.

On March 17, 1977, the Chicago Board and the appellees concluded a settlement agreement with respect to the unresolved issues. The agreement was incorporated into an order entered the same day which provided that "solely as applied to the Special Mayoral Election to be held in Chicago on June 7, 1977," the signature requirement would be reduced to 20,000 and the filing deadline extended to April 18. App 74. The District Court denied the State Board's subsequent motion to vacate both orders.

The State Board, but not the Chicago Board, appealed both the March 14 opinion and the March 17 order. In a per curiam decision rendered six months after the election, the Court of Appeals for the Seventh Circuit adopted the opinion of the District Court. 566 F2d 586, 587 (1977). Also, with respect to the March 17 order, the Court of Appeals dismissed as moot the State Board's contention that the Chicago Board lacked authority to conclude a settlement agreement without prior state approval. In so ruling, the court noted that the settlement order applied only to the June 7 election, which had long passed, and held that the question of the Chicago Board's authority for its actions was not "capable of repetition, yet evading review," Id., at 588, quoting DeFunis v Odegaard, 416 US 312, 318–319, 40 L Ed 2d 164, 94 S Ct 1704 (1974).

We noted probable jurisdiction, 435 US 994, 56 L Ed 2d 82, 98 S Ct 1644 (1978), and we now affirm.

II

[2, 3] Appellant argues here, as it did below, that this Court's summary affirmance of Jackson v Ogilvie, supra, is dispositive of the equal protection challenge here. In analyzing this contention, we note at the outset that summary affirmances have considerably less precedential value than an opinion on

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the merits. See Edelman v Jordan, 415 US 651, 671, 39 L Ed 2d 662, 94 S Ct 1347

(1974). As Mr. Chief Justice Burger observed in Fusari v Steinberg, 419 US 379, 392, 42 L Ed 2d 521, 95 S Ct 533 (1975) (concurring opinion), "upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established." See Usery v Turner Elkhorn Mining Co. 428 US 1, 14, 49 L Ed 2d 752, 96 S Ct 2882 (1976).

Moreover, we agree with the District Court's conclusion that Jackson does not govern the issues currently before us. In that case, the Reverend Jesse Jackson, an independent candidate for Mayor of Chicago, attacked the 5% signature requirement for independent candidates as an impermissible burden on the exercise of First Amendment rights. He contended as well that the discrepancy between the 5% rule and the less stringent requirements for candidates of established political parties violated the Equal Protection Clause. A three-judge District Court rejected both claims, finding the 5% requirement reasonable and the burdens imposed on independent and established party candidates roughly equivalent. Appellees mount a different challenge. They do not attack the lines drawn between independent and established party candidates. Rather, their equal protection claim rests on the discrimination between those independent candidates and new parties seeking access to the ballot in statewide elections and those similarly situated candidates and parties seeking access in city elections.

Appellant urges, however, that even though the District Court in Jackson did not explicitly mention the equal protection issue presented here, the issue was raised in a memorandum supporting Jackson filed with the District Court by the State. In the course of arguing that the election law discriminated against independent candidates, the memorandum stated:

> "It must also be remembered that it is even more difficult for an independent candidate to obtain signatures than
>
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>
> it would be for an independent party. Yet a whole new State political party needs only 25,000 signatures throughout the entire State for state officers, (Section 10-2), while a single independent candidate for only the office of Mayor of Chicago, needs almost 60,000 signatures. This also is an invidious discrimination against one seeking the office of Mayor of Chicago." Memorandum of Law, App to Juris Statement in Jackson v Ogilvie, OT 1970, No. 70–1341, p B-23.[7]

In view of the District Court's ultimate decision, appellant contends, this issue was necessarily resolved against Jackson, and therefore was resolved by this Court as well in its summary affirmance.

The District Court in Jackson, however, framed the equal protection issue before it as "whether [the 5% signature] requirement operates to discriminate against the plaintiff

7. Appellees Rose and the United States Labor Party argue that even this statement does not present the issue now before the Court. In their view, it refers to the purported disparity between the treatment of independent candidates and that of new political parties. In fact, appellees argue, there is and was no such disparity. Compare Ill Ann Stat, ch 46, § 10-2 (Supp 1978), with § 10-3.

by depriving him of a right granted to candidates of established political parties." 325 F Supp, at 868. The jurisdictional statement posed the question in similar terms. Juris Statement in Jackson v Ogilvie, OT 1970, No. 70–1341, pp 14–15. Although the jurisdictional statement alluded to the State's memorandum, id., at 15, and incorporated it as a separate appendix, id., at B-21–B-24, at no point did it directly address the question now before us.

[4] This omission disposes of appellant's argument. As we stated in Mandel v Bradley, 432 US 173, 176, 55 L Ed 2d 199, 97 S Ct 2238 (1977), the precedential effect of a summary affirmance can extend no farther than "the precise issues presented and necessarily decided by those actions." A summary disposition affirms

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only the judgment of the court below, ibid., quoting Fusari v Steinberg, supra, at 391–392, 42 L Ed 2d 521, 95 S Ct 533 (Burger, C. J., concurring), and no more may be read into our action than was essential to sustain that judgment. See Usery v Turner Elkhorn Mining Co., supra, at 14, 49 L Ed 2d 752, 96 S Ct 2882; McCarthy v Philadelphia Civil Service Comm'n, 424 US 645, 646, 47 L Ed 2d 366, 96 S Ct 1154 (1976) (per curiam). Questions which "merely lurk in the record," Webster v Fall, 266 US 507, 511, 69 L Ed 411, 45 S Ct 148 (1925), are not resolved, and no resolution of them may be inferred. Assuming that the State's memorandum in Jackson can be read as advancing the issue presented here, see n 7, supra, the issue was by no means adequately presented to and necessarily decided by this Court. Jackson therefore has no effect on the constitutional claim advanced by appellees.

III

[1b, 5] In determining whether the Illinois signature requirements for new parties and independent candidates as applied in the city of Chicago violate the Equal Protection Clause, we must examine the character of the classification in question, the importance of the individual interests at stake, and the state interests asserted in support of the classification. See Memorial Hospital v Maricopa County, 415 US 250, 253–254, 39 L Ed 2d 306, 94 S Ct 1076 (1974); Dunn v Blumstein, 405 US 330, 335, 31 L Ed 2d 274, 92 S Ct 995 (1972); Kramer v Union School Dist. 395 US 621, 626, 23 L Ed 2d 583, 89 S Ct 1886 (1969); Williams v Rhodes, 393 US 23, 30, 21 L Ed 2d 24, 89 S Ct 5, 45 Ohio Ops 2d 236 (1968).

The provisions of the Illinois Election Code at issue incorporate a geographic classification. For purposes of setting the minimum-signature requirements, the Code distinguishes state candidates, political parties, and the voters supporting each, from city candidates, parties, and voters. In 1977, an independent candidate or a new political party in Chicago, a city with approximately 718,937 voters eligible to sign nominating petitions for the mayoral election in 1977,[8] had to

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secure over 10,000 more signatures on nominating petitions than an independent candidate or new party in state elections, who had a pool of approximately 4.5 million eligible voters from which to

8. Chicago Board of Election Commissioners, Municipal Election Results (Apr. 1, 1975).

obtain signatures.[9] That the distinction between state and city elections undoubtedly is valid for some purposes does not resolve whether it is valid as applied here.

Restrictions on access to the ballot burden two distinct and fundamental rights, "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." Williams v Rhodes, supra, at 30, 21 L Ed 2d 24, 89 S Ct 5, 45 Ohio Ops 2d 236. The freedom to associate as a political party, a right we have recognized as fundamental, see 393 US, at 30–31, 21 L Ed 2d 24, 89 S Ct 5, 45 Ohio Ops 2d 236, has diminished practical value if the party can be kept off the ballot. Access restrictions also implicate the right to vote because, absent recourse to referendums, "voters can assert their preferences only through candidates or parties or both." Lubin v Panish, 415 US 709, 716, 39 L Ed 2d 702, 94 S Ct 1315 (1974). By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences. And for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure. Wesberry v Sanders, 376 US 1, 17, 11 L Ed 2d 481, 84 S Ct 526 (1964); Reynolds v Sims, 377 US 533, 555, 12 L Ed 2d 506, 84 S Ct 1362 (1964); Dunn v Blumstein, supra, at 336, 31 L Ed 2d 274, 92 S Ct 995.

[6] When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest. American Party of Texas v White, 415 US 767, 780–781, 39 L Ed 2d 744, 94 S Ct 1296 (1974); Storer v Brown, 415 US 724, 736, 39 L Ed 2d 714, 94 S Ct 1274 (1974); Williams v Rhodes, supra, at 31, 21 L Ed 2d 24, 89 S Ct 5, 45 Ohio Ops 2d 236. To be sure, the Court has previously acknowledged that States have a

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legitimate interest in regulating the number of candidates on the ballot. In Lubin v Panish, supra, at 715, 39 L Ed 2d 702, 94 S Ct 1315, we observed:

> "A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidate's desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence would tend to impede the electoral process. . . . The means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support is not."

Similarly, in Bullock v Carter, 405 US 134, 145, 31 L Ed 2d 92, 92 S Ct 849 (1972) (footnote omitted), the Court expressed concern for the States' need to assure that the winner of an election "is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections." Consequently, we have upheld properly drawn statutes that require a preliminary showing of a

9. U.S. Dept of Commerce, Bureau of the Census, Statistical Abstract of the United States 505 (1977).

"significant modicum of support" before a candidate or party may appear on the ballot. Jenness v Fortson, 403 US 431, 442, 29 L Ed 2d 554, 91 S Ct 1970 (1971); see, e. g., American Party of Texas v White, supra.

[7] However, our previous opinions have also emphasized that "even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty," Kusper v Pontikes, 414 US 51, 58–59, 38 L Ed 2d 260, 94 S Ct 303 (1973), and we have required that States adopt the least drastic means to achieve their ends. Lubin v Panish, supra, at 716, 39 L Ed 2d 702, 94 S Ct 1315; Williams v Rhodes, supra, at 31–33, 21 L Ed 2d 24, 89 S Ct 5, 45 Ohio Ops 2d 236. This requirement is particularly important where restrictions on access to the ballot are involved. The States' interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the political development of the Nation. Abolitionists, Progressives, and Populists have undeniably had influence, if not always electoral

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success. As the records of such parties demonstrate, an election campaign is a means of disseminating ideas as well as attaining political office. See A. Bickel, Reform and Continuity 79–80 (1971); W. Binkley, American Political Parties 181–205 (3d ed 1959); H. Penniman, Sait's American Political Parties and Elections 223–239 (5th ed 1952). Overbroad restrictions on ballot access jeopardize this form of political expression.

The signature requirements for independent candidates and new political parties seeking offices in Chicago are plainly not the least restrictive means of protecting the State's objectives. The Illinois Legislature has determined that its interest in avoiding overloaded ballots in statewide elections is served by the 25,000-signature requirement. Yet appellant has advanced no reason, much less a compelling one, why the State needs a more stringent requirement for Chicago. At oral argument, appellant explained that the signature provisions for statewide elections originally reflected a different approach than those for elections in political subdivisions. Tr of Oral Arg 35–37. Not only were independent candidates and new political parties in state elections required to obtain 25,000 signatures, but those signatures also had to meet standards pertaining to geographic distribution. By comparison, candidates and parties in city elections had only to obtain signatures from a flat percentage of the qualified voters. In Moore v Ogilvie, 394 US 814, 23 L Ed 2d 1, 89 S Ct 1493 (1969), this Court struck down on equal protection grounds Illinois' requirement that the nominating petition of a candidate for statewide office include the signatures of at least 200 qualified voters from at least 50 counties. Following Moore, the Court of Appeals for the Seventh Circuit invalidated a provision in the amended statute which specified that no more than 13,000 signatures on a new party's petition for statewide elections could come from any one county. Communist Party of Illinois v State Board of Elections, 518 F2d 517, cert denied,

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423 US 986, 46 L Ed 2d 303, 96 S Ct 394 (1975). Thus, appellant

noted, the invalidation of the geographic constraints had tied the requirements for both city and state candidates solely to a population standard, giving rise to the anomaly at issue here.

Although this account may explain the anomaly, appellant still has suggested no reasons that justify its continuation. Historical accident, without more, cannot constitute a compelling state interest. We therefore hold that the Illinois Election Code is unconstitutional insofar as it requires independent candidates and new political parties to obtain more than 25,000 signatures in Chicago.

IV

[8] Appellant finally challenges the Court of Appeals' disposition of its appeal from the March 17 settlement order. The court dismissed as moot appellant's claim that the Chicago Board lacked authority to conclude a settlement agreement without the State's consent. In appellant's view, the court erred in not placing this claim within the exception to the mootness doctrine for cases that are "capable of repetition, yet evading review." Southern Pacific Terminal Co. v ICC, 219 US 498, 515, 55 L Ed 310, 31 S Ct 179 (1911).

In Weinstein v Bradford, 423 US 147, 149, 46 L Ed 2d 350, 96 S Ct 347 (1975), we elaborated on this exception, holding that a case is not moot when:

"(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again."

Although the first branch of the test is satisfied here, appellant has presented no evidence creating a reasonable expectation that the Chicago Board will repeat its purportedly unauthorized actions in subsequent elections. Appellant's conclusory assertions that the actions are capable of repetition

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are not sufficient to satisfy the Weinstein test, particularly since appellant does not contend that the Chicago Board has ever attempted previously to conclude litigation without its approval. The Chicago Board's entry into a settlement agreement reflected neither a policy it had determined to continue, cf. United States v New York Telephone Co. 434 US 159, 165 n 6, 54 L Ed 2d 376, 98 S Ct 364 (1977), nor even a consistent pattern of behavior, cf. SEC v Sloan, 436 US 103, 109–110, 56 L Ed 2d 148, 98 S Ct 1702 (1978). And the Chicago Board's action patently was not a matter of statutory prescription, as was the case in other election decisions on which appellant relies, e. g., Storer v Brown, 415 US, at 737 n 8, 39 L Ed 2d 714, 94 S Ct 1274; Moore v Ogilvie, supra, at 816, 23 L Ed 2d 1, 89 S Ct 1493. We therefore find that appellant's challenge was properly dismissed as moot.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

The **Chief Justice** concurs in the judgment.

SEPARATE OPINIONS

Mr. Justice **Blackmun**, concurring.

Although I join the Court's opinion and its strict-scrutiny approach for election cases, I add these comments to record purposefully, and perhaps somewhat belatedly, my unrelieved discomfort with what seems to be a continuing tendency in this Court to use as tests such easy phrases as "compelling [state] interest" and "least drastic [or restrictive] means." See, ante, at 184, 185 and 186, 59 L Ed 2d, at 241, 242. I have never been able fully to appreciate just what a "compelling state interest" is. If it means "convincingly controlling," or "incapable of being overcome" upon any balancing process, then, of course, the test merely announces an inevitable result, and the test is no test at all. And, for me, "least drastic means" is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation, and thereby enable himself to

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vote to strike legislation down. This is reminiscent of the Court's indulgence, a few decades ago, in substantive due process in the economic area as a means of nullification.

I feel, therefore, and have always felt, that these phrases are really not very helpful for constitutional analysis. They are too convenient and result oriented, and I must endeavor to disassociate myself from them. Apart from their use, however, the result the Court reaches here is the correct one. It is with these reservations that I join the Court's opinion.

Mr. Justice **Stevens**, concurring in part and concurring in the judgment.

Placing additional names on a ballot adds to the cost of conducting elections and tends to confuse voters. The State therefore has a valid interest in limiting access to the ballot to serious candidates. If that interest is adequately served by a 25,000-signature requirement in a statewide election, the same interest cannot justify a larger requirement in a smaller election.

Nonetheless, I am not sure that the disparity evidences a violation of the Equal Protection Clause. The constitutional requirement that Illinois govern impartially would be implicated by a rule that discriminates, for example, between Socialists and Republicans or between Catholics and Protestants. But I question whether it has any application to rules prescribing different qualifications for different political offices. Rather than deciding that question, I would simply hold that legislation imposing a significant interference with access to the ballot must rest on a rational predicate. This legislative remnant is without any such support. It is either a product of a malfunction of the legislative process or merely a byproduct of this Court's decision in Moore v Ogilvie, 394 US 814, 23 L Ed 2d 1, 89 S Ct 1493, see post, at 190–191, 59 L Ed 2d, at 245 (Rehnquist, J., concurring in judgment). In either event, I believe it has deprived appellees of their liberty without the "due process of lawmaking" that the

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Fourteenth Amendment requires. Cf. Delaware Tribal Business Committee v Weeks, 430 US 73, 98, 51 L Ed 2d 173, 97 S Ct 911 (Stevens, J., dissenting).

For these reasons I concur in the Court's judgment and in Parts I, II, and IV of its opinion.

Mr. Justice **Rehnquist,** concurring in the judgment.

I concur in the judgment of the Court, but I cannot join its opinion: It employs an elaborate analysis where a very simple one would suffice. The disparity between the state and city signature requirements does not make sense, and this Court is intimately familiar with the reasons why.

In 1968, Illinois had a coherent set of petition requirements for obtaining a place on the ballot. In order to appear on the ballot in a county or city election, it was necessary for independent candidates and new political parties to obtain voter signatures equal in number to 5% of the voters who voted in the political subdivision at the last general election. Requirements for statewide office put greater emphasis on geographical balance: Independent candidates and new political parties needed 25,000 signatures, and at least 200 signatures had to be obtained from each of 50 counties within the State. Thus, a candidate for statewide office at that time could get on the ballot with fewer signatures than the candidate for office in Cook County, but he was also subject to special restrictions. It was reasonable for Illinois to conclude that this scheme best vindicated its interest in "protect[ing] the integrity of its political processes from frivolous or fraudulent candidacies." Bullock v Carter, 405 US 134, 145, 31 L Ed 2d 92, 92 S Ct 849 (1972). Cook County is not Illinois, and all the State asked was that candidates **and** political parties interested in statewide office produce this minimal evidence of statewide support.

In 1969, this Court held that the 200 voters per county requirement violated the Equal Protection Clause because different

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counties had different populations. Moore v Ogilvie, 394 US 814, 23 L Ed 2d 1, 89 S Ct 1493 (1969). That decision led to a holding by the Seventh Circuit that the statute, as amended by the legislature after Moore to place a 13,000-signature limit on new political party, signatures from any one county, was likewise a denial of equal protection. Communist Party of Illinois v State Board of Elections, 518 F2d 517 (CA7) cert denied, 423 US 986, 46 L Ed 2d 303, 96 S Ct 394 (1975).

The courts having knocked out key panels in an otherwise symmetrical mosaic, it is not surprising that little sense can be made of what is left. Given this history, I cannot subscribe to my Brother Stevens alternative characterization of Illinois' problem as "a malfunction of the legislative process." The legislature enacted a comprehensive Election Code, and amended it once in response to a decision of this Court. The attorneys for the State Board of Elections are now placed in the position of having to defend a law which is but a truncated version of the original enactment.

All of this explains the disparate treatment of statewide and Chicago candidates; it does not justify it under any rational-basis test, and appellant has scarcely made any effort to do so before this Court. In the light of this history, and without engaging in any elaborate analysis which pretends that we are dealing with the considered product of a legislature, I would hold that the disparate treatment bears no rational relationship to any state interest.

EDITOR'S NOTE

An annotation on "Fourteenth Amendment equal protection clause as affecting nomination or election to state office," appears p 852, infra.